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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

KEENE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether this Court should resolve the irreconcilable conflicts among the First, Second, Fourth and Ninth Circuits as to whether admiralty jurisdiction applies to claims arising from injury allegedly caused by exposure to asbestos-containing products on vessels in navigable waters or in shipyards.

2. Whether this Court should resolve the irreconcilable conflicts among the Circuits as to whether administrative regulations promulgated

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1. This is Keene Corporation's original designation of corporate relationships pursuant to Supreme Court Rule 28.1. Bairnco Corporation is the parent of Keene Corporation. BZ Acquisition Corp. is a wholly-owned subsidiary of Bairnco Corporation. Lightolier, Incorporated is a wholly-owned subsidiary of BZ Acquisition Corp. Lightolier, Incorporated is an affiliate of Keene Corporation.

The caption of this action contains the names of all of the parties hereto.

by the Department of Justice pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2672, restrict the subject matter jurisdiction of the federal court in cases brought under the FTCA.

3. Whether the court below applied an overly restrictive interpretation of the administrative filing requirements of the Federal Tort Claims Act, 28 U.S.C. § 2675, rendering it impossible for a litigant who incurs continuing damages in thousands of pending lawsuits to comply with those procedures in a single action and thereby compelling it to file separate claims against the United States of America (the "Government") in each of the thousands of lawsuits, particularly where the Government publicly refuses to settle any such claim.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Keene Corporation ("Keene") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States

Court of Appeals for the Second Circuit (hereinafter "Second Circuit") entered on February 10, 1983.

OPINIONS BELOW

The opinion and judgment below of the Second Circuit appears in the appendix commencing at A-1. The opinion is officially reported at 700 F.2d 836. The opinion and judgment of the United States District Court for the Southern District of New York, which was affirmed by the Second Circuit, appears in the Appendix commencing at A-40. This decision is not officially reported, but is unofficially reported at [1980-81 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9083. The opinion of the District Court denying Keene's motion for reargument, which is not officially reported, appears in the appendix commencing at page A-80.

JURISDICTION

The opinion and judgment of the Second Circuit of which review by this Court is sought was entered on February 10, 1983. The jurisdiction of this Court to review the judgment below exists pursuant to 28 U.S.C. § 1254(1).

EXISTENCE OF JURISDICTION BELOW

The courts below dismissed this action for lack of subject-matter jurisdiction. Keene contends that the District Court's jurisdiction was properly invoked under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, or, alternatively, under the general admiralty and maritime law of the United States of America, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, the Extension of Admiralty Jurisdiction Act, 46 U.S.C.

§ 740, and the Public Vessels Act, 46 U.S.C. §§ 781-790, or, alternatively, under 28 U.S.C. § 1331 and the common law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2761-2680

28 U.S.C. § 2672

28 U.S.C. § 2674

28 U.S.C. § 2675(a)

Public Vessels Act, 46 U.S.C. § 781

Suits in Admiralty Act, 46 U.S.C. § 742

28 U.S.C. § 1333

The pertinent text of the constitutional and statutory provisions involved are set forth in the Appendix commencing at A-88.

STATEMENT OF THE CASE

The Second Circuit's decision has necessitated this petition for writ of certiorari (1) to resolve the conflict among the First, Second, Fourth and Ninth Circuits, as well as numerous district courts, on the application of admiralty jurisdiction to claims of injury allegedly caused by exposure to asbestos-containing thermal insulation products in shipyards and on vessels in navigable waters, and third-party claims arising out of those actions; (2) to resolve the conflict among the Circuits as to whether administrative regulations promulgated by the Department of Justice pursuant to the FTCA restrict the district court's subject matter jurisdiction over suits against the Government; and (3) because the Second Circuit's overly restrictive interpretation of the administrative filing requirements of

the FTCA would otherwise render it impossible for a litigant incurring continuing damages in thousands of pending lawsuits to comply with those requirements.

This action arises out of the thousands of lawsuits presently pending in state and federal courts throughout the United States (the "underlying cases") in which the plaintiffs (the "claimants") have alleged personal injury or wrongful death caused by exposure to asbestos-containing thermal insulation products. Petitioner Keene Corporation has been named as a defendant in more than 17,000 of the underlying cases.[2] A

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2. Keene itself has never manufactured or sold any thermal insulation products containing asbestos. In 1968, Keene acquired the stock of Baldwin-Ehret-Hill, Inc. ("BEH"), which was later merged into a wholly-owned Keene subsidiary, Keene Building Products Corporation ("KBPC"). BEH was a minor manufacturer of thermal insulation products containing asbestos. BEH never mined asbestos, and purchased asbestos from the Govern-

(footnote continued)

majority of the claimants in the underlying cases have alleged exposure to asbestos fibers while engaged in the installation of thermal insulation on ships during their initial construction, during the repair of ships already launched, and during rip-outs of old thermal insulation from ships. These claimants worked with asbestos-containing thermal insulation on ships already afloat in navigable waters, on vessels in dry dock in the shipyards and in shops on land in the shipyard.

In the present action, Keene seeks to recover in one action, rather than in thousands of individual direct or third-party actions, its damages from the Government for injury, indemnity,

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(footnote continued from previous page) ment, as well as from mining and manufacturing companies. Between 1968 and 1972, all asbestos was removed from BEH's thermal insulation product lines. In 1974, Keene sold all of the stock of KBPC. Keene, KBPC and BEH will be collectively referred to herein as "Keene".

contribution, apportionment and other damages which Keene has suffered as a result of the negligent or wrongful acts or omissions of the Government. Thousands of the claimants in the underlying cases were employees of the Government who worked in U.S. naval shipyards or were workers in private shipyards under contract to the Government. Keene's claims arise from the Government's use and specification of asbestos-containing thermal insulation products in connection with the Government's massive shipbuilding projects of the 1940's, 1950's and 1960's under conditions which the Government knew were dangerous to the health of shipyard workers exposed to these products.

Despite its knowledge of the adverse health effects of asbestos as early as 1938, the Government extensively specified the use of asbestos in

thermal insulation products and permitted no deviation from these specifications. Indeed, one of Keene's products, "Super Powerhouse Cement," did not include asbestos fiber as an ingredient, but a special military formulation was created to include asbestos solely in order to meet the Government's specifications. The Government had the knowledge and technical skill to prevent worker exposure to excessive dust concentration, and developed and established workplace safety standards regarding the handling of asbestos-containing products which were designed to prevent the contraction of asbestos-related injuries by shipyard workers. The Government failed, however, to observe or enforce its own safety standards and repeatedly violated those standards from the 1940's to the 1970's. The Government also failed to disclose both its

own knowledge of the adverse health effects of asbestos and its failure to observe its own safety standards to its workers, contractors and suppliers, including Keene. As a result of the Government's action, Keene has been named as a defendant in thousands of lawsuits brought by claimants who worked in United States naval or government contract shipyards.

The Government is presently a defendant or third-party defendant in approximately 1,200 asbestos-related actions involving nearly 13,000 individual claims. According to a recent statement, "the government's position in the pending asbestos litigations is that it has no tort liability to the victims of asbestos-related diseases." Oversight Hearings on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims, before Sub-

Comm. on Labor Standards of the House Comm. on Education & Labor, 97th Cong., 2d Sess (1982) (statement of J. Paul McGrath, Assistant U.S. Attorney General) (Sept. 9, 1982) at 1 (A96-97).[3]

Proceedings Below

In January 1979, Keene presented various agencies of the Government with notice of Keene's claims for damages against the Government pursuant to the requirements of the FTCA and the applicable regulations thereunder. Rather than filing thousands of individual notices for each of the underlying actions, Keene presented its entire claim in one notice in order to avoid massive duplication and repetition.

In its notice, Keene stated that its total damages with respect to the

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3. A copy of this statement is reprinted in the Appendix commencing at page A-95.

underlying cases pending or resolved as of the time of its claim was in the amount of $1,088,135, with the proviso that "[t]his sum certain does not include other Damages of which Keene is presently unaware."[4] Keene also provided the Government with the general and specific allegations of the Government's misconduct, and provided or offered to make available to the Government virtually all of the information concerning the underlying cases available to Keene, most of which was already in the Government's possession.

Six months elapsed without any final disposition of Keene's claims by the various agencies. Keene then filed its complaint pursuant to 28 U.S.C. § 2675(a).

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4. In the ad damnum clause of its notice of claim, Keene also stated that "the United States of America is indebted to Keene for Damages in the sum of $1,088,135 and in an additional amount yet to be ascertained."

The District Court erroneously dismissed Keene's complaint for lack of subject matter jurisdiction. The court held, inter alia,[5] that Keene's claims did not lie within admiralty jurisdiction on the grounds that the installation of high temperature thermal insulation around pipes and boilers on vessels in navigable waters did not bear a relationship to traditional maritime activity. The court concluded that "[t]here is simply no significant relationship between the hazards of asbestos and

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5. The district court also held the exclusivity provisions of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), barred Keene's claims with respect to underlying cases brought by past or present government employees. A-72-73. Although the Second Circuit did not directly address this issue, it also stated that FECA barred suits against the United States for contribution and indemnity by joint tortfeasors. A-36 n.13, 700 F.2d at 845 n.13. This Court's recent decision in Lockheed Aircraft Corp. v. United States, 103 S. Ct. 1033 (1983), has effectively overruled both of these holdings.

traditional maritime activity." (A70-71) The District Court also incorrectly held that Keene had not satisfied the administrative filing requirements of the FTCA and the regulations promulgated thereunder.

The Second Circuit affirmed the decision of the District Court for essentially the same reasons expressed in the District Court's decision. With respect to admiralty jurisdiction, the court ruled that Keene's claims was not within admiralty jurisdiction because such claims are not sufficiently related to "traditional maritime activity." In so holding, the court specifically declined to follow the contrary decision of the Fourth Circuit in White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981) ("White II"), cert. denied, 454 U.S. 1163 (1982) (admiralty jurisdiction applies to personal injury

claims of asbestos workers in shipyards).[6] (A-35)

The Second Circuit also affirmed the dismissal of Keene's claims under the FTCA on the grounds that Keene's notice of claim did not satisfy the FTCA's administrative requirements. The Court acknowledged that there is a split in the Circuits as to whether compliance

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6. White II was decided five days after the District Court's decision in Keene rejecting admiralty jurisdiction. In two companion cases decided the same day, the Fourth Circuit also held that "[a] noncontractual indemnity claim arising [from a maritime tort claim] is similarly a maritime claim . . . to be assessed under principles of maritime law." White v. Johns-Manville Corp., 662 F.2d 243, 247 (4th Cir. 1981) (citation omitted), and that admiralty jurisdiction could be exercised over a manufacturer's contractual indemnity claim against the Government. Glover v. Johns-Manville Corp., 662 F.2d 225 (4th Cir. 1981). Keene had moved for reconsideration before the District Court on the basis of the Fourth Circuit's decisions, but the court refused to apply the Glover and White II decisions to Keene's suit, and denied the motion for reconsideration. The Second Circuit also refused to follow the Glover decision.

with the administrative regulations promulgated under the FTCA, as opposed to the statutory requirements, was a jurisdictional prerequisite to bringing suit under the FTCA. The court below applied the stricter standards inherent in the regulations, rather than those of the statutory filing requirements, as jurisdictional prerequisites to Keene's suit.

The court held that Keene's reservation as to future damages rendered indefinite Keene's specific statement of its claim's worth. The Court required Keene to provide an itemization of damages, including defense costs and increased insurance costs, for each of the thousands of cases pending against Keene. The court also held that Keene had not provided sufficient information so that the Government could investigate Keene's claims. In concluding, the

Court in essence held that Keene could not bring one action for all of its claims, but rather "[t]he very volume and diversity of claims which have placed Keene in its unfortunate position also preclude the wholesale adjudication of its essentially individual, retail claims against the government." A-38, 700 F.2d at 845.

REASONS FOR GRANTING THE WRIT

I. THE CLEAR AND IRRECONCILABLE CONFLICT AMONG THE DECISIONS OF THE FEDERAL CIRCUITS ON THE APPLICATION OF ADMIRALTY JURISDICTION TO THOUSANDS OF LAWSUITS WARRANTS REVIEW AND RESOLUTION BY THIS COURT

The conflict among the federal circuits that have considered the application of admiralty jurisdiction to claims of injury caused by exposure to asbestos-containing products in shipyards and on navigable waters, and

third-party claims arising out of those actions, warrants review by this Court of the Second Circuit's decision below. In the absence of intervention by this Court, the application of admiralty law in factually identical circumstances will depend solely upon the forum in which the suit is pending. Furthermore, to the extent that claims in the underlying cases against Keene are held to be cognizable in admiralty, Keene clearly should be permitted to seek contribution or indemnity on the same jurisdictional basis.

In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), and Foremost Insurance Co. v. Richardson, 102 S. Ct. 2654 (1982), this Court emphasized the need for uniform rules where special maritime concerns relating to navigation or commerce are present. By the same token, uniform rules should

govern where two claimants are injured by alleged asbestos exposure under virtually identical factual circumstances. No such uniformity presently exists as to the application of admiralty jurisdiction to claims of injury allegedly caused by exposure to asbestos-containing products on vessels in navigable waters or in shipyards.

In White II the Fourth Circuit held that shipyard workers engaged in ship construction and ship repair were engaged in traditional maritime activity, such that claims for injury during that work fell within admiralty jurisdiction "because the installation of the asbestos products has a direct effect on marine navigation and commerce." 662 F.2d at 239.

However, in Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983), the Ninth Circuit

ruled that admiralty jurisdiction did not lie to hear a plaintiff's claim for personal injury arising from exposure to asbestos-containing products while employed in a shipyard. Acknowledging the conflict among the Circuits, the Ninth Circuit stated:

> "In so holding, we decline to follow the holding of the Fourth Circuit [in White II], which recently determined that admiralty jurisdiction existed in an action substantially similar to the one underlying this mandamus proceeding". Id. at 971.

Similarly, in Austin v. Unarco Industries, Inc., No. 82-1168 (1st Cir. Mar. 30, 1983),[7] the First Circuit also declined to follow the White II decision and instead held that admiralty jurisdiction did not apply to the claims of a claimant alleging exposure to asbestos while working aboard ships in navigable

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7. The unreported decision in Austin is reprinted in the Appendix commencing at A-105.

water. The Court specifically noted the split in the Circuits on this issue, stating:

> "In addressing this question, we note that there is already some disagreement among the circuits both as to the proper analysis and as to the ultimate resolution of the issue . . . [citing Keene, Owens-Illinois and White II]. For reasons set out below, we disagree, in part, with the analysis of all three courts, but we are pursuaded that the result reached by the Second and Ninth Circuits is sound." A-134-135.

In the present action, the Second Circuit declined to apply admiralty jurisdiction because it held that the roles of the parties did not bear a significant relationship to maritime activities such as navigation or commerce, and that "[g]eneral allegations that the contacts with asbestos took place in shipyards or even aboard launched vessels are thus insufficient to establish admiralty jurisdiction."

A-34, 700 F.2d at 844. The Second Circuit also recognized conflict among the Circuits in declining to follow the Fourth Circuit in White II. A-35, 700 F.2d at 844. In addition, the court below implicitly recognized that the Circuits are in conflict on the application of admiralty jurisdiction over an indemnity action arising out of a claim alleging exposure in a maritime setting. In so holding, the Second Circuit expressly declined to follow the reasoning of the Fifth Circuit in Sperry Rand Corp. v. Radio Corp. of America, 618 F.2d 319 (5th Cir. 1980), which had held that a claim for contribution or indemnity with respect to an injury cognizable in admiralty and caused by a product not specifically or exclusively made for maritime use nonetheless fell within admiralty jurisdiction. The Court also declined to follow the Fourth Circuit's

decision in Glover v. Johns-Manville Corp., 662 F.2d 225 (4th Cir. 1981), which had held that admiralty jurisdiction could apply to a manufacturer's contractual claim for indemnity against the Government. A-35-36, 700 F.2d at 845.

The Second Circuit's decision in this case has thus destroyed the chance for uniformity, and has made resolution of whether the distinct and unique body of admiralty law will apply to the claims of a particular claimant or third-party action arising out of those claims, dependent solely upon the forum in which the action is brought.[8] Fur-

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8. The confusion generated by these conflicting decisions and results is further reflected in decisions being handed down in district courts throughout the country. Compare, e.g., In re General Dynamics Asbestos Cases, C.M.L. No. 1 (D. Conn. Mar. 25, 1983) (permitting plaintiffs to amend complaint to add allegations of admiralty jurisdiction), and Jacobowitz v. Johns-Manville Sales Corp., No. 79 C 865

(footnote continued)

thermore, in the Second Circuit, Keene is being forced to defend asbestos personal injury claims in the underlying cases in many instances where the sole or primary jurisdictional basis is admiralty. See Jacobowitz, A-186, and In re General Dynamics Asbestos Cases, A-214, supra. Ironically, the Second Circuit's decision prohibits Keene from seeking indemnity or contribution for such claims on the basis of admiralty jurisdiction. To the extent Keene is being held liable under admiralty juris-

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(footnote continued from previous page) (E.D.N.Y. Sept. 28, 1982) (same), with Franklin v. Johns-Manville Corp., No. C81-533M (W.D. Wash. June 10, 1982), aff'd upon reconsideration (Sept. 20, 1982) (despite claim of 95% exposure on ships and navigable waters, motion to amend complaint to add allegations of admiralty jurisdiction denied). Factually identical cases are thus being governed by different bodies of law, depending upon the court in which the cases are pending. The unreported decisions in General Dynamics, Jacobowitz and Franklin are reported in the Appendix commencing at A-178, A-186 and A-214, respectively.

diction, Keene clearly should be permitted to seek indemnity on the same jurisdictional basis.

There are thousands of cases pending in this country where the issue of admiralty jurisdiction has been and is being raised. In light of the conflicting opinions being rendered, the need is clear and the time is ripe for review of this important issue by the Court.

II. THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER COMPLIANCE WITH ADMINISTRATIVE REGULATIONS ADOPTED BY THE JUSTICE DEPARTMENT PURSUANT TO THE FTCA IS A JURISDICTIONAL PREREQUISITE TO SUIT AGAINST THE GOVERNMENT SHOULD BE RESOLVED BY THIS COURT

As noted by the Second Circuit, there is a conflict among the Circuits as to whether a failure to comply with the administrative regulations promul-

gated by the Justice Department pursuant to the FTCA can serve to bar a claimant from subsequently commencing suit pursuant to 28 U.S.C. § 2675(a). At least four Circuits have held that where a claimant such as Keene has exhausted its administrative remedies in accordance with the statutory provisions of 28 U.S.C. § 2675, any alleged failure to meet the requirements of the Justice Department's administrative regulations respecting the contents of the administrative filing does not deprive the Court of jurisdiction. See Adams v. United States, 615 F.2d 284 (5th Cir. 1980); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981); Tucker v. United States Postal Service, 676 F.2d 954 (3d Cir. 1982); Avery v. United States, 680 F.2d 608 (9th Cir. 1982). These courts have reasoned that the regulations are designed to facilitate

the settlement of claims by the Government. Adams v. United States, supra, 615 F.2d at 290. Where the Government has refused to settle a claim, the regulations cease to be pertinent. Jurisdiction of the district court to hear the claim is created by Congressional enactment, not by administrative fiat.

Other courts have engrafted the administrative filing regulations onto the statute in determining the existence of subject matter jurisdiction. House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir.), cert. denied, 439 U.S. 862 (1978);[9] Lunsford v. United States, 570 F.2d 221 (8th Cir. 1977).

The Second Circuit ostensibly did not address this conflict and left the issue unresolved. A-20-21 n.9, 700 F.2d at 841 n.9. The Court's reasoning,

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9. The House decision may be considered to have been overruled sub silentio by a subsequent Ninth Circuit panel in Avery v. United States, supra.

however, effectively (and improperly) applied the stricter standards inherent in the administrative regulations, and not present in the FTCA itself, as a jurisdictional prerequisite to suit, defeating the exercise of jurisdiction in this action. Keene was required under the statute to provide only the "minimal notice" of its claims. Avery v. United States, supra, 680 F.2d at 611. The requirements created by the Second Circuit's interpretation of the administrative regulations, that explicit detail be provided with respect to each of the 17,000 underlying cases, directly conflicts with the rulings of at least four other Circuits. This conflict is thus ripe for resolution by this Court.

This Court should resolve the conflict and hold that a failure to comply with administrative requirements cannot

deprive a plaintiff of the right to commence his action in federal court where the provisions of the statute have been satisfied. As the Sixth Circuit stated in Douglas v. United States 658 F.2d 445, 447-48 (6th Cir. 1981):

> "These regulations, however, govern administrative settlement proceedings; they do not set federal jurisdictional prerequisites. By failing to comply with regulations promulgated under 28 U.S.C. § 2672, a claimant loses only 'the opportunity to settle his or her claim outside the courts.' Adams, supra, 615 F.2d at 290." (emphasis added).

III. THE DECISION BELOW PLACES AN OVERLY STRICT INTERPRETATION OF THE ADMINISTRATIVE FILING REQUIREMENTS OF THE FTCA AND WOULD RENDER IT IMPOSSIBLE FOR A CLAIMANT SUCH AS PETITIONER TO EVER FILE A SINGLE CLAIM AGAINST THE GOVERNMENT

Under the reasoning of the Second Circuit's decision, no party suffering continuing injury due to mass tort litigation could ever bring an omnibus ac-

tion against the Government for indemnity. The Second Circuit's decision would require that a party such as Keene commence individual actions for each of the 17,000 lawsuits, notwithstanding the massive duplication of effort involved. The relitigation of identical issues in thousands of identical actions is precisely the result Keene sought to avoid,; such a cumbersome process can serve no purpose but to clog the courts unnecessarily.

In its administrative notice of claim, Keene gave its claim a specific dollar amount, and provided (or offered to make available) to the Government virtually all of the information concerning its claim which is available to Keene. The Second Circuit nonetheless held that Keene had not submitted a valid administrative claim, reasoning that (1) a reservation of rights as to

damages resulting from underlying cases to be brought in the future rendered the sum uncertain; (2) Keene was required to itemize its particular damages for each underlying case, rather than providing a total amount of its claim, and (3) Keene had not provided the Government with sufficient information to evaluate Keene's claims, despite the fact that Keene had provided virtually all the information available to it.

The Second Circuit placed an unduly narrow construction on the statutes permitting suit against the Government. The purpose of the filing requirements of the FTCA are so that information will be provided the Government to facilitate settlement.

As a practical matter, Keene could not have provided any more information regarding its claims, absent the providing of all of the papers generated in

each of the 17,000 underlying actions. In fact, Keene offered to permit the Government to review all of its files respecting underlying cases which had been resolved through settlement or judgment. The Government declined Keene's invitations. In addition, the Government, which is a defendant in thousands of underlying cases, is fully aware of the facts and allegations underlying Keene's claim. Furthermore, any effort to duplicate these millions of documents would be an utterly futile act as the Government has made clear that it will not settle any of the asbestos-related cases brought against it (A-96-97). This completely undercuts the Second Circuit's rationale of requiring that a claimant provide the Government with massive amounts of information to investigate the claim.

Keene also could not have stated a sum with any greater particularity as to its damages suffered as of the date of the filing of its notice of claim, as that was indeed the specific damages suffered as of that date. The Second Circuit's requirement that there be an itemization of each item of damage, including attorneys' fees and insurance costs, as to each underlying case, is an overly restrictive interpretation of the jurisdictional requirements of the FTCA and is contrary to the emerging trend of recent decisions of this Court accelerating the movement against purely technical impediments to a sovereign's liability. See, e.g., Block v. Neal, 103 S.Ct. 1089 (1983) ("misrepresentation" exception to liability under the FTCA not applicable where government employee negligently performs inspection); Community Communications Co. v. City of

Boulder, 102 S.Ct. 835 (1982) (municipalities do not enjoy antitrust exemptions of states under the Sherman Act); Owen v. City of Independence, 445 U.S. 622 (1980) (restricting scope of immunity of municipal officials); Butz v. Economou, 438 U.S. 478 (1978) (immunity restricted for federal officials).

As this Court has observed:

> "'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'" United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949) (quoting Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926)).

See also Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955). The Second Circuit's unduly rigid interpretation of the Government's waiver of sovereign immunity requires review by this Court in order to avoid "refinement

of construction" of the Government's waiver of sovereign immunity which would render it impossible to bring a single action against the Government and require petitioner to implead the Government in 17,000 pending cases.

CONCLUSION

The decision below is appropriate for review by this Court for the reasons stated herein, and Petitioner prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

May 11, 1983

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 -- August Term, 1982

(Argued October 1, 1982 Decided February 10, 1983)

Docket No. 82-6023

KEENE CORPORATION,

Plaintiff-Appellant,

- v.-

UNITED STATES OF AMERICA,

Defendant-Appellee.

B e f o r e:

LUMBARD, OAKES and WINTER,

Circuit Judges.

Plaintiff Keene Corporation appeals from a final judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel,

Judge), dismissing Keene's amended complaint for lack of subject matter jurisdiction, and from an order denying Keene's motion for reargument.

Affirmed.

EUGENE R. ANDERSON, New York, New York (Anderson, Russell, Kill & Olick, P.C., New York, New York, Irene C. Warshauer, Marcy Louise Kahn, Frederic L. Neustadt, Daniel N. Sang, New York, New York, of counsel), for Appellant.

DAVID M. JONES, Assistant United States Attorney, Southern District of New York (John S. Martin, Jr., United States Attorney, Southern District of New York, Peter C. Salerno, Assistant United States Attorney, Southern District of New York, of counsel), for Appellee.

WINTER, Circuit Judge:

Keene Corporation appeals from a judgment dismissing its complaint for

lack of subject matter jurisdiction entered by Judge Gerard L. Goettel, United States District Court for the Southern District of New York. The gravamen of Keene's complaint is that the United States is liable under various legal theories for the costs of more than 14,000[1] personal injury and wrongful death actions against Keene, arising from occupational exposure to asbestos fibers contained in thermal insulation products manufactured or sold by a Keene

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1. In January, 1979, when Keene filed its Amended Notice of Claim with a number of government agencies in an attempt to comply with the Federal Tort Claims Act, approximately 1,000 suits had been brought against the company. The original complaint in this action was filed on January 2, 1980. By November of that year, approximately 5,959 cases and claims had been filed against Keene, and as of April 1, 1982, 12,775 lawsuits had been filed. At oral argument on October 1, 1982, counsel for Keene informed us that the number of suits now exceeded 14,000, roughly 45 more cases being filed each week. As of April 1, 1982, only 2,888 of these claims had been terminated, either by settlement, verdict, non-suit or dismissal.

affiliate.[2] On appeal, Keene urges that jurisdiction over this action exists under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671-2680 (1976) or, alternatively, under the general maritime and admiralty jurisdiction of the United States, 28 U.S.C. § 1333 (1976), the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1976), the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740

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2. Keene Corporation was organized in 1967 and one year later acquired most of the stock of Baldwin-Ehret-Hill, Inc. ("BEH"). BEH, together with its predecessors, manufactured and sold thermal insulation products containing asbestos. In 1970 BEH was merged into a newly created wholly-owned Keene subsidiary, Keene Building Products Corporations ("KBPC"). In 1974, KBPC transferred all assets and liabilities relating to the thermal insulation products to a division of Keene known as Keene Insulation and Contracting Division. Keene then sold its stock in KBPC to an unidentified person. KBPC and its predecessors have been named as defendants in an unspecified number of the lawsuits.

(1976), and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1976).[3]

Keene's amended complaint alleges that the United States is liable to it for all costs arising out of the more than 14,000 actions. However, it has made no attempt to categorize the ac-

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3. In the district court, Keene also raised, as grounds for jurisdiction, the general federal question jurisdiction of the court, 28 U.S.C. § 1331 and the common law. Although Keene all but abandons these claims on appeal, see infra note 13, it is clear that Section 1331 does not establish a waiver of sovereign immunity and therefore cannot act as a basis for federal jurisdiction in this case.

Keene has also brought an action for breach of contract against the government which is currently pending before the Court of Claims. See Keene Corp. v. United States, No. 579-79C (Ct. Cl., filed Dec. 21, 1979). Keene's petition in the Court of Claims seeks damages for indemnity and contribution arising from express and implied contracts between the government and KBPC. In that action, the Court of Claims denied a government motion for summary judgment on the ground that material issues of fact remain in dispute. Keene Corp. v. United States, No. 579-79C (Ct. Cl. May 1, 1981) (per curiam).

tions against it on the basis of individual characteristics, such as the role played by the United States, the employment relationship of the claimants, the circumstances under which they came into contact with asbestos, or the theory or theories of liability. Some of Keene's allegations, moreover, use terms such as "most" or "typically" in describing the actions against it.

For example, the complaint alleges that the government played the following roles relating to the actions against it: a seller of asbestos fiber, a purchaser of asbestos insulation, a designer or specifier of insulation products, an employer of the claimants or their employers, an inspector of the claimants' workplace, and a promulgator and enforcer of health regulations. In the case of any particular claim against Keene, however, the government may have

played only one of these roles. Similarly, Keene alleges only that "most" of the claimants were "either employees of the defendant working in U.S. naval shipyards or employees working in private shipyards under contract to the U.S. Navy, an agency of the United States." According to Keene, the claimants "typically" assert that they worked with or around thermal insulation products bearing asbestos and that in the course of their work, they were exposed to and inhaled air-borne asbestos fibers, causing asbestosis or other injuries. "Typically," the complaint alleges, the workers were involved in shipyards, some working on shipboard, some on land, while still others were exposed to asbestos in the course of installing insulation in "power plants and other industrial and commercial plants, including refineries." The

Government sold Keene some of, but apparently not all, the asbestos used in its products, and Keene's asbestos-containing products were sold under contract both to the government and to others. On the basis of these allegations, Keene asserts against the United States twenty-three causes of action, sounding in negligence, breach of warranty, strict liability, and unjust enrichment.

Keene has denied the allegations of all 14,000 complaints and has not yet been subjected to a final judgment of liability. It has, however, settled some of the claims and incurred expenses in the defense of others. Relying upon the doctrines of indemnification, contribution and apportionment, Keene argues that the government is liable for any and all damages it may sustain as a result of the lawsuits against it.

The unusual nature of the complaint and the legal problems it raises stem from the sheer volume and diversity of claims brought against Keene. Keene's counsel asserts, and we have no reason to doubt it, that Keene simply cannot afford to hire local counsel and defend each case in the many state and federal judicial districts in which actions have been brought against it. Presumably, it also cannot afford the discovery necessary to analyze and categorize each action so that some semblance of order can be brought to its complaint or even to implead the government as a third party defendant in actions pending in federal district courts.

As the complaint before us stands, potentially dozens of materially different factual combinations are within its allegations. Looking at the more specific allegations, the government may

have played at least six different roles involving at least three different categories of claimant/employees, who came into contact with Keene asbestos products in at least three different work settings. Some of Keene's products were sold to the government, some to others. Some were manufactured with asbestos purchased from the government, some with asbestos purchased elsewhere. The complaint is not limited even to these variables, however, since the words "most" and "typically" strongly imply the existence of actions with other factual patterns. Twenty-three separate causes of action against the government are alleged.

The complaint thus literally alleges dozens of factual combinations, e.g., (1) The government purchased insulation from Keene containing asbestos procured from a private producer; the

insulation was used in a private shipyard under contract to the government where employees of the shipyard were in contact with it on land; (2) A refinery purchased insulation from Keene containing asbestos procured from a private producer; employees of the refinery came into contact with it in circumstances covered by government health regulations; (3) A refinery purchased insulation from Keene containing asbestos purchased from the government; employees of the refinery came into contact with it; (4) A factory purchased insulation from Keene containing asbestos procured from a private producer; the product used asbestos pursuant to government specifications and employees of the factory came into contact with it; and so on. Each combination of facts, moreover, may raise a different legal issue so far as to the government's liability

to Keene or our jurisdiction is concerned.

Were this an action against a private party, the sufficiency of the notice given by the complaint would obviously be a serious issue. Since the United States is the defendant, however, and actions against it are permissible only where sovereign immunity has been waived, we must first address the government's challenge to our jurisdiction. We agree with Judge Goettel, whose efforts in reducing this suit to order we much appreciate, that "Keene has attempted to do too much at one time, with too little jurisdiction," Keene Corp. v. United States, No. 80 Civ. 401, mem. op. at 22 (S.D.N.Y. Sept. 30, 1981). We affirm his dismissal of the complaint for substantially the reasons stated in his opinion.

FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680, requires that a claimant against the federal government file an administrative claim with the appropriate agency prior to institution of suit. Thus, 28 U.S.C. § 2675(a) provides in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. . . . The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Keene contends that it has met the administrative filing requirements or, alternatively, that no administrative filing was necessary because its suit is "in the nature of a third party action."

In September 1978, Keene filed a Notice of Claim with eight federal agencies;[4] four months later, in January 1979, it filed an Amended Notice of Claim.[5] The Amended Notice contained a list of lead plaintiffs and docket numbers for roughly a thousand lawsuits.[6]

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4. These agencies included the General Services Administration, the Department of Justice, the Judge Advocate General of the Army, the Department of Health, Education and Welfare, the Surgeon General, the Department of Defense, the Department of Labor, and the United States Public Health Service.

5. Since Keene's Amended Notice of Claim was filed prior to final administrative disposition of the September Notice, it totally supercedes that initial Notice. See C.F.R. § 14.2(b).

6. Keene asserts that it has filed a subsequent Notice of Claim for another 3,822 claims, more or less, and contends
(footnote continued)

It described the claims against Keene as contending generally that the company had sold products containing asbestos fiber without adequate warning of the dangers posed by asbestos and stated that "[m]any if not all of the Asbestos Claims against Keene arise out of the primary fault of United States of America." The Amended Notice stated five separate claims based on (1) the government's role as supplier of asbestos; (2) its role as employer of shipyard workers who were exposed to asbestos fibers on the job; (3) the government's failure to take precautions or

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(footnote continued from previous page) that the filing of the notice during this litigation should not bar consolidation of those claims with the earlier 1,000 claims comprised in the Amended Notice, citing Kubrick v. United States, 581 F.2d. 1092, 1098 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979); McCormick v. Cooley, 458 F. Supp. 776 (W.D. Pa. 1978). Because of the result we reach regarding the sufficiency of the Amended Notice, we need not reach this issue.

warn workers regarding the dangers of asbestos after it required the use of asbestos in insulating products it purchased; (4) the failure of the government to make safety inspections of facilities using asbestos; and (5) "any other theory that will support a claim against the United States of America for Damages."

Keene did not link any of the one thousand appended claims with one or another of these grounds of liability. It simply asserted that

> [t]o the extent that Keene settles or has settled any such claim and to the extent that Keene has been or is held liable in any court or administrative tribunal or has incurred costs and expenses, including attorneys' fees, costs of insurance and the cost of executive time with respect respect to or in connection with such Asbestos Claims, then the United States of America is liable to Keene for indemnity, contribution or both. "Damages" as used herein includes all such settlements, judgments, indemnity,

> contribution, costs, expenses, insurance premiums, attorneys' fees, the cost of executive time, and such other and further relief as is just and proper.

The Amended Notice then stated,

> The present amount of such Damages applicable to each of the claims set forth below is the sum of $1,088,135. This sum certain does not include other Damages of which Keene is not presently aware.

Later, the Amended Notice again asserted

> that the United States of America is indebted to Keene for Damages in the sum of $1,088,135 and in an additional amount yet to be ascertained.

The requirement that a notice of claim be filed is jurisdictional and cannot be waived. House v. Mine Safety Appliance Co., 573 F.2d 609, 617 (9th Cir.), cert. denied, 439 U.S. 862 (1978). Moreover, because the FTCA constitutes a waiver of sovereign immunity, the procedures set forth in Section 2675 must be adhered to strictly.

Three-M Enterprises, Inc. v. United States, 548 F.2d 293, 295 (10th Cir. 1977); Brown v. General Services Administration, 507 F.2d 1300, 1307 (2d Cir. 1974), aff'd, 425 U.S. 820 (1976).

Since Keene has filed no Notice of Claim regarding the vast majority of the suits against it,[7] it is clear that no jurisdiction exists under the FTCA as to these claims. As to the remaining claims, the government also contends that the Amended Notice is defective because it failed to state a sum certain, 28 C.F.R. § 14.2 (1980), and because it does not provide sufficient information to permit an investigation, see 28 C.F.R. § 14.4 (1980), as required by regulations promulgated pursuant to 28 U.S.C. § 2672.[8]

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7. See supra note 6.

8. 28 U.S.C. § 2672 provides in pertinent part that

(footnote continued)

While there is a conflict among the courts concerning whether the administrative filing requirements of Section 2675 -- which are jurisdictional in nature -- should be read in the light of regulations issued under 28 U.S.C.

(footnote continued from previous page)

> [t]he head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

§ 2672,[9] courts seem agreed that the statement of damages in any Notice of Claim must contain a sum certain. See, e.g., Adams v. United States, supra note

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9. For example, the Fifth Circuit has ruled that the regulations do not apply to Section 2675 because they bear solely on the procedures to be followed for the settlement of claims and not on the manner in which a claimant must present his or her claim. Adams v. United States, 615 F.2d 284, 288 (5th Cir. 1980). Similarly, in Douglas v. United States, 658 F.2d 445, 447-48 (6th Cir. 1981), the Sixth Circuit held that

> [t]hese regulations, however, govern administrative settlement proceedings; they do not set federal jurisdictional prerequisites. By failing to comply with regulations promulgated under 28 U.S.C. § 2672, a claimant loses only "the opportunity to settle his or her claim outside the courts." (citation omitted)

In contrast, other circuits have applied the Section 2672 regulations in determining the sufficiency of a Notice of Claim. See, e.g., House v. Mine Appliances, 573 F.2d at 615-16; Lunsford v. United States, 570 F.2d 221, 225 (8th Cir. 1977); Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11, 19-20 (3d Cir. 1975). Although the Second Circuit has not directly address-

(footnote continued)

9, 615 F.2d at 291 n.15 (Section 2672 regulations do not apply to Section 2675 but the claimant still must state a sum certain). Section 2675 is designed, in conjunction with Section 2672, to provide a procedure under which the government may investigate, evaluate and consider settlement of a claim. This purpose requires that the Notice of Claim provide sufficient information both to permit an investigation and to estimate the claim's worth. It seems clear to us that a claim which includes "an additional amount yet to be determined," which may dwarf the sum stated, is a request for damages so indefinite as to fail to satisfy the statutory purpose.

(footnote continued from previous page) ed the issue, district judges in this circuit have applied the Section 2672 regulations to Section 2675. See e.g., Luria v. Civil Aeronautics Board, 473 F. Supp. 242, 244 (S.D.N.Y. 1979); Kantor v. Kahn, 463 F. Supp. 1160 (S.D.N.Y. 1979). We find it unnecessary to decide this issue.

Faced with a reservation as to future damages which may entail huge sums, government officials cannot possibly evaluate the claim with a view to settlement.

Keene suggests that the Court may strike as surplusage the reservation as to future claims, Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981); Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976). However, Keene failed to satisfy statutory purpose even as to its $1,088,135 claim because it did not specify the amount of indemnity or contribution it demanded for each underlying lawsuit. Where separate claims are aggregated under the FTCA, the claimant must present the government with a definite damage amount for each claim. Kantor v. Kahn, supra note 9, 463 F. Supp. at 1164. Only with a breakdown on a claim by claim basis

can the government evaluate the underlying merits of the claims against it in order to decide whether to settle or to litigate.

Keene's Amended Notice is insufficient on yet a second ground. The generality of the statement claiming liability on the part of the government failed to provide sufficient information regarding the nature and merits of Keene's claim so far as liability is concerned. The burden is on the claimant to provide this information, Kantor, supra, and that burden is not met simply either because the government is generally familiar with asbestos litigation or because the case names and docket numbers are appended to the Notice. Keene's Notice does no more than create an opportunity for the government to sift through the record of each of the lawsuits named. That is not sufficient

notice to enable the government to evaluate its exposure so far as liability is concerned.

The problem of the sufficiency of notice in this case is more than a question of technical niceties. Keene's laundry list of potential variables makes it impossible for the government -- or a court -- to evaluate Keene's action against the government. Dozens of different combinations of material facts are possible under the complaint, and the exposure of the government on liability may vary enormously between them, yet, short of a detailed examination of each action against Keene, the government cannot evaluate that exposure. Keene's failure even to organize the individual suits by general category simply makes it impossible for the government to respond to Keene's suit. We are aware that the cost of ordering the

thousands of actions brought against Keene may be staggering. The FTCA, however, does not authorize us to balance relative means or relative hardships but places the burden on the claimant to provide sufficient details of the claim made against the government.

Keene contends that it is excused from the filing requirement because its suit is in the nature of a third party complaint. 28 U.S.C. § 2675. However, under Fed. R. Civ. P. 14, a third party action is one in which a defendant asserts a claim against a non-party to the original action for all or part of the plaintiff's claim against him. Since Keene is the original complainant in this suit, its action is not within Rule 14. See generally, 6C Wright & A. Miller, Federal Practice and Procedure §§ 1441, 1453-55 (1971). We

perceive no reason to read the FTCA's reference to third party actions as included more than is encompassed by Rule 14.[10]

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10. Keene relies heavily upon a case decided by Judge Blumenfeld, Raybestos-Manhattan, Inc. v. United States, No. H-78-416 (D. Conn. Feb. 15, 1979). In that case, approximately 100 suits had been filed against Raybestos, a manufacturer of asbestos insulation products, by employees of the Elecric Boat Division of the General Dynamics Corporation for damages as a result of their exposure to asbestos. Other insulation manufacturers were also named as defendants in the suit. Raybestos, however, was the only defendant which was a citizen of Connecticut and, as a result of the absence of diversity jurisdiction, the Electric Boat employees, who were also Connecticut citizens, had to sue Raybestos in a state court, while those who were citizens of Rhode Island brought their actions in the District of Connecticut.

While Raybestos impleaded the United States in the federal suits, it was unable to implead the United States in the state court actions, 28 U.S.C. § 1346(b), and, therefore, filed an independent action in the district court for indemnity and contribution for the state court actions. Judge Blumenfeld denied the government's motion to dismiss for lack of subject matter juris-

(footnote continued)

ADMIRALTY JURISDICTION

The Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§ 741-752, and the Public Vessels Act ("PVA"), 46 U.S.C. §§ 781-790, waives sovereign immunity in the area of maritime torts. Under the SIAA the United States waives sovereign

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(footnote continued from previous page) diction, holding that the action should be brought within the third party exception of 28 U.S.C. § 2675(a) in order to further the joinder policies behind Fed. R. Civ. P. 14 and to avoid needless duplication of litigation. Judge Goettel distinguished Raybestos on the grounds that Judge Blumenfeld's ruling created the opportunity for joint trial and joint discovery for a small number of claims that were in almost every way similar to and a part of the larger federal action. While Raybestos involved indemnification for suits in only one federal district and the courts of one state, the present case involves suits in numerous federal and state courts. Finally, unlike the defendant in Raybestos, Keene has failed to implead the United States into those suits which were brought against it in the federal courts. Since we hold that Keene's action is clearly not covered by Rule 14, we express no opinion as to the merits of the distinctions relied upon by Judge Goettel as far as Raybestos is concerned.

immunity with respect to cases in which "if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742. The PVA waives sovereign immunity with respect to "damages caused by a public vessel of the United States." 46 U.S.C. § 781. Keene argues that even if we lack jurisdiction over its claim under the FTCA,[11] federal jurisdiction exists in admiralty.

Admiralty jurisdiction in tort exists when the wrong (1) took place on navigable waters ("situs") and (2) "bear[s] a significant relationship to traditional maritime activity" ("sta-

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11. These jursidictional bases are mutually exclusive. The FTCA specifically provides that it does not apply to suits in admiralty against the United States. 28 U.S.C. § 2680(d).

tus"). Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254-61 (1972); Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780 (U.S. June 22, 1982) (approving application of Executive Jet test outside the context of aviation torts); see also Kayfetz v. Walker, 404 F. Supp. 75, 76 (D. Conn. 1975) (Lumbard, Circuit Judge).[12]

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12. Keene argues that the situs test must be read in the light of the Extension of Admiralty Jurisdiction Act ("EAJA"), 46 U.S.C. § 740, which extends admiralty jurisdiction to injuries on land caused by a vessel or its appurtenances, and, relying upon White v. Johns-Manville Corp., 662 F.2d 234, 239 (4th Cir. 1981), cert. denied, 102 S.Ct. 1037 (1982) ("White II"), asserts that once installed, asbestos-containing insulation becomes an appurtenance of the vessel. However, Keene has failed to meet the requirements of the EAJA. Like the FTCA, the EAJA requires submission of a notice of claim to the appropriate federal agencies prior to filing suit in the district court. Keene's Amended Notice does not constitute an adequate "claim" under the EAJA for the same reason that it fails to satisfy the FTCA notice requirements. Keene's argument regarding the EAJA is also somewhat beside the point in view of our holding

(footnote continued)

The Amended Complaint states that "[m]ost of the claimants [against Keene] were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, on vessels in navigable waters, and in power plants and other industrial and commercial plants, including refineries." Admiralty jurisdiction clearly does not extend to those workers who were exposed to asbestos in power plants, refineries, and other land-based commercial facilities, and even if the other workers were exposed to asbestos in a maritime situs, see White II, supra note 12, 662 F.2d at 242 (Widener, J., concurring), it is impossible to determine which of the

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(footnote continued from previous page) that its claim satisfies neither the situs nor the status tests of Executive Jet. Although failure to satsify either would be fatal to admiralty jurisdiction, our reasoning in rejecting the claim of admiralty situs applies equally to the extended situs test of the EAJA.

underlying actions would be properly heard in admiralty, and which not, without a case by case evaluation. Where a group is composed of workers with and without maritime status, admiralty jurisdiction does not exist as to the group. Brown v. United States, No. H-76-434, slip op. at 21-22 (D. Conn. July 23, 1979). Keene now offers to make such an individualized showing in an evidentiary hearing before the district court. Since Keene refused several previous opportunities to individualize the claims against it, we believe this offer comes too late. Moreover, Keene has not met the second prong of the Executive Jet test, the status requirement, and a hearing on individualized situs would be futile.

Keene argues that the fact that its products were ultimately installed and used on shipboard is, by itself, suffi-

cient to meet the status test of Executive Jet. However, Keene's argument makes the geographic location of a tort decisive as a matter of law and thus effectively collapses the situs and status test, a result Executive Jet expressly seeks to avoid.

In Kelly v. United States, 531 F.2d 1144, 1146 (2d Cir. 1976), we stated that the status test is satisfied when the "acts and omissions . . . sufficiently relate to traditional maritime activity," whether land-based or not. Under the Kelly decision, two elements are critical in this case. First, Keene does not allege that its insulation was designed specifically for maritime use. Indeed, it appears from the complaint that it was used in a variety of land-based plants and refineries. Second, many of the roles attributed to the government and allegedly giving rise to

Keene's causes of action -- the government's sale of asbestos to Keene, its specification of asbestos as a component of insulation it purchased from Keene, its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations -- do not bear a significant relationship to traditional maritime activities such as "navigation and commerce." See Kayfetz v. Walker, 404 F. Supp. at 76. These roles seem even less intimately connected with such activities than contracts for shipbuilding, contracts to supply materials for ship construction and warranties arising under such contracts, which are non-maritime, see, e.g., North Pacific Steamship Co. v. Hall Brothers Marine Railway and Shipbuilding Co., 249 U.S. 119, 126-27 (1919); White v. Johns-Manville Corp., 662 F.2d 243, 247 (4th Cir. 1981)

("White I"); G. Gilmore and C. Black, The Law of Admiralty 26 (2d ed. 1975), and contract for services to a vessel laid up and out of navigation, also non-maritime status. G. Gilmore and C. Black, The Law of Admiralty at 26. Indeed, a tort arising out of work on an uncompleted vessel has been held to fall outside admiralty jurisdiction. Hollister v. Luke Construction Co., 517 F.2d 920, 921 (5th Cir. 1975) (per curiam). General allegations that the contacts with asbestos took place in shipyards or even aboard launched vessels are thus insufficient to establish admiralty jurisdiction. These defects in the complaint are fatal as well to Keene's argument that its contractual breach of warranty and indemnity claims sound in admiralty. The government's sale of asbestos to Keene is a contract lacking in maritime flavor, as is, absent fur-

ther specification, Keene's provision of insulation to the government.

Viewed as a whole, therefore, Keene's claims fail to implicate traditional concepts of maritime law such as seaworthiness, cargo damage, salvage, or the like. We expressly decline to follow the reasoning of the Fourth Circuit in White II, 662 F.2d at 239-40 (holding that the personal injury claims of shipyard workers engaged in installation of asbestos insulation are cognizable in admiralty), White I, 662 F.2d at 249 (holding the manufacturers' third party complaint against the workers' employer also fell within admiralty jurisdiction), and Glover v. Johns-Manville Corp., 662 F.2d 225, 232 (4th Cir. 1981) (insofar as it held that admiralty jurisdiction might exist over manufacturers' indemnity claims against the government under the SIAA or PVA) and,

as well, the reasoning of the Fifth Circuit in Sperry Rand Corp. v. Radio Corporation of America, 618 F.2d 319 (5th Cir. 1980) (holding that an action for indemnity or contribution could be brought in admiralty against a manufacturer whose products were implicated in a grounding of a vessel and a collision upon navigable waters even though the articles in question were not designed specifically for marine use).[13]

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13. Insofar as we find that Keene has not met the jurisdictional requirements of the FTCA, SIAA or PVA, we need not consider its claims under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193 (1976). The FECA is the exclusive remedy of federal employees, such as federal shipyard workers, against the United States, although they may, of course, institute suit against third parties such as Keene. The FECA does not constitute a waiver of sovereign immunity as to third parties; indeed it bars suits against the United States for contribution and indemnification by joint tortfeasors. See 5 U.S.C. § 8116(c); Galimi v. Jetco, Inc., 514 F.2d 949, 953 (2d Cir. 1975). Even were suits for indemnification possible,

(footnote continued)

CONCLUSION

Our rejection of Keene's claims in no sense reflects either a lack of sympathy for its predicament or a belief

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(footnote continued from previous page) because there is no waiver of sovereign immunity under the FECA, Keene would be required to assert an independent jurisdictional base under FTCA, SIAA, or PVA. For the reasons stated in the body of this opinion, such jurisdictional grounds are foreclosed. General federal question jurisdiction, 28 U.S.C. § 1331, is also lacking because it contains no waiver of sovereign immunity. See supra note 3. To the extent that Keene's claims for indemnity are contractual, its remedy is in the Court of Claims under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491. See Galimi, 514 F.2d at 951 n.2.

Keene also seeks recovery of the FECA benefits that the government has recouped from government employee asbestos claimants through its statutory lien on their awards or settlements from third parties. 5 U.S.C. § 8132. Once again Keene claims jurisdiction for its claim under the FTCA and SIAA, which we have already held to be barred. Keene also raises general federal question jurisdiction for this claim, alleging, inter alia, that there has been an unconstitutional taking of property without due process. We agree with Judge Goettel that insofar as Keene

(footnote continued)

that Keene's counsel might have somehow remedied the fatal defects in its complaint. The very volume and diversity of claims which have placed Keene in its unfortunate position also preclude the wholesale adjudication of its essentially individual, retail claims against the government. Upholding Keene's complaint might well "put the government's feet to the fire" in order to provoke a legisla-

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(footnote continued from previous page) relies on Section 1331 to establish federal jurisdiction for a suit involving a constitutional tort following the rational of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), it is mistaken precisely because there is no waiver of sovereign immunity. Bivens authorizes suits against the responsible federal official, Butz v. Economou, 438 U.S. 478, 504 (1978), not against the government itself, Norton v. United States, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978), and Bivens-type actions against the United States are, as the district court noted, routinely dismissed for lack of subject matter jurisdiction, See, e.g., Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 104 (2d Cir. 1981).

tive solution to the burgeoning asbestos litigation, but it would also do violence to established processes of the judicial system and well established principles relating to the FTCA and admiralty jurisdiction.

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - x

KEENE CORPORATION, :

Plaintiff, : 80 Civ. 401 (GLG)

-against- :

THE UNITED STATES OF AMERICA, : O P I N I O N

Defendant. :

- - - - - - - - - - - - x

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G O E T T E L, D. J.:

This action arises out of the proliferation of litigation relating to exposure to asbestos that has saturated federal and state courts throughout the country.[1] Plaintiff Keene Corporation ("Keene") is a defendant in over 6000 lawsuits brought by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal

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1. Asbestos is a mineral fiber that appears throughout the world and which is best known for its use as an insulator against heat. It has been recognized for over fifty years that the inhalation of asbestos dust can produce a disease known generally as asbestosis. Asbestosis is technically defined as a form of pneumoceniosis. Although lawsuits arising out of exposure to asbestos are commonly referred to as asbestosis lawsuits, they actually include a variety of diseases such as lung cancer, cancer of the esophagus, cancer of the stomach, and cancer of the colon. For a general description of asbestosis and asbestosis litigation, see Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), and the authorities cited therein; In Re Asbestos & Asbestos Insulation Material Products Liability Litigation, 431 F. Supp. 906 (J.P.M.L. 1977).

insulation products alleged to have been manufactured or sold by Keene and its subsidiaries.[2] In this action, Keene seeks indemnity and contribution from the United States for all damages that Keene may sustain as a result of these lawsuits.[3] The Government moves to dis-

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2. Keene alleges that it has never manufactured or sold thermal insulation products that contain asbestos. Keene was organized and formed in 1967. In 1968, Keene acquired most of the stock of Baldwin-Ehret-Hill, Inc. ("B-E-H") which, together with its predecessors, had manufactured and sold thermal insulation products containing asbestos fiber. In 1970, B-E-H was merged into a newly created Keene subsidiary, Keene Building Products Corporation ("KBPC"). Keene sold the stock of KBPC in 1974.

3. The gist of Keene's claims against the Government is that the Government utilized asbestos-containing thermal insulation up until 1979 despite the Government's knowledge, allegedly as early as 1938, of the hazards of asbestos. Keene also alleges that the Government had the knowledge and technical skill to prevent worker exposure to excessive dust concentration, but failed to take appropriate action. (The Government has reserved its right, pending decision of this motion, to move to dismiss for failure to state a claim against these novel theories of liability.)

miss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Court lacks subject matter jurisdiction over the claims asserted by Keene.

In its amended complaint, Keene alleges twenty-three separate causes of action sounding in negligence, breach of warranty, strict liability, and unjust enrichment, as well as a violation of the Due Process Clause of the United States Constitution. Keene has also brought an action for breach of contract against the Government that is currently pending in the United States Court of Claims.[4] See Keene Corp. v. United States, No. 579-79C (Ct. Cl., filed

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4. In its petition in the Court of Claims, Keene seeks damages for indemnity and contribution allegedly arising from express and implied contracts between the Government and KBPC. The Court of Claims recently denied a Government motion for summary judgment on the ground that issues of material fact remain in dispute. See Keene Corp. v. United States, No. 579-79C (Ct. Cl. May 1, 1981) (per curiam).

Dec. 21, 1979). Jurisdiction for this action is asserted under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., alternatively under the general admiralty and maritime law of the United States of America, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, and the Public Vessels Act, 46 U.S.C. §§ 781-790, and alternatively, under 28 U.S.C. § 1331 and the common law. Having reviewed the thousands of pages of memoranda and affidavits submitted by the parties in connection with this motion, the Court has determined that this action is barred by the doctrine of sovereign immunity.

The Federal Tort Claims Act

The jurisdictional issue under the Federal Tort Claims Act ("FCTA"), 28

U.S.C. § 2671 et seq., stems from the requirement that the claimant file an administrative claim with the appropriate federal agency prior to instituting suit. 28 U.S.C. § 2675. Section 2675 provides in pertinent part that

> [a]n action shall not be instituted upon a claim against the United States for money . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied. . . . The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter claim. (Emphasis added.)

Keene contends that this action is in "the nature" of a third party complaint and consequently comes under the exception for third party claims. In the alternative, it argues that this administrative filing requirement has been satisfied.

The purpose of the administrative filing requirement is to expedite the settlement of tort claims asserted

against the government and to avoid unnecessary litigation. Adams v. United States, 615 F.2d 284 (5th Cir.), rehearing denied, 622 F.2d 197 (5th Cir. 1980). The exception for third party complaints is consistent with this purpose in that it fosters the policy of the Federal Rules of Civil Procedure favoring resolution of as many claims as possible in one lawsuit. Raybestos-Manhattan, Inc. v. United States, No. H-78-416, slip op. at 7 (D. Conn. Feb. 15, 1979); Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212, 1219 (1967). The administrative filing requirement is jurisdictional and cannot be waived. House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir.), cert. denied, 439 U.S. 862 (1978); Goulding v. United States, 488 F. Supp. 755 (D. Ariz. 1980), rev'd on other grounds sub nom. Poindexter v. United States, 647 F.2d 35

(9th Cir. 1981). Moreover, because it constitutes a waiver of sovereign immunity, the procedures delineated in section 2675 must be strictly construed. Three-M Enterprises, Inc. v. United States, 548 F.2d 293, 295 (10th Cir. 1977); Brown v. General Services Administration, 507 F.2d 1300, 1307 (2d Cir. 1974), aff'd, 425 U.S. 820 (1976). Consequently, the exceptions for third party complaints, cross-claims, and counterclaims have likewise been strictly construed. See, e.g., West v. United States, 592 F.2d 487 (8th Cir. 1979); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir.), cert. denied, 429 U.S. 857 (1976); Bernard v. U.S. Lines, Inc., 475 F.2d 1134, 1136 (4th Cir. 1973). It would appear, therefore, that Keene's contention that the Court should treat this action as being "in the nature of a third party action" should be summarily

rejected. Our only hesitancy in so proceeding comes from the unpublished decision in Raybestos-Manhattan, Inc. v. United States, supra, in which Judge Blumenfeld of the United States District Court of Connecticut did something like what Keene proposes the Court do here.

Raybestos arose from highly unusual circumstances. Approximately one hundred suits had been filed against Raybestos-Manhattan, Inc. ("Raybestos"), a manufacturer of asbestos insulation products, by employees of the Electric Boat Division of the General Dynamics Corporation ("Electric Boat") for damages resulting from their exposure to asbestos. Suits against other manufacturers of asbestos products had been filed in the District of Connecticut as well. Raybestos, however, was the only manufacturer defendant that was a citizen of Connecticut. As a result, the Electric Boat employees who were citi-

zens of Connecticut were required to sue Raybestos in Connecticut state court because there was no diversity jurisdiction.

Raybestos impleaded the United States in all of the cases filed against Raybestos in federal court. Because it could not implead the United States in the state court actions, see 28 U.S.C. § 1346(b), Raybestos filed an independent action in the district court for indemnity and contribution for the state court actions. The Government moved to dismiss for lack of subject matter jurisdiction. Judge Blumenfeld denied the motion, holding that the complaint should be treated as a third party complaint to the extent that it would bring the action within the "third party" exception of 28 U.S.C. § 2675(a).

The principal reason underlying Judge Blumenfeld's decision was to gain judicial economy in an unusual set of

circumstances. The same considerations do not apply to the case at bar. All the cases filed in the District of Connecticut by employees of Electric Boat had been consolidated for purposes of discovery because of the complexity of the litigation. This action, in contrast, involves twenty-eight separate federal districts and includes cases that are not related to shipbuilding activities. See generally In Re Asbestos & Asbestos Insulation Material Products Liability Litigation, 431 F. Supp. 906 (J.P.M.L. 1977). (Ironically, none of the cases brought against Keene have been filed in this district.) Moreover, unlike Raybestos, which had impleaded the United States in those cases that had been filed in federal court, Keene has generally not impleaded the United States in the federal actions brought against Keene. To the extent that cases brought against Keene have

been terminated, this action would not effectuate any of the joinder policies of Rule 14 discussed by Judge Blumenfeld in Raybestos. In short, whereas Judge Blumenfeld avoided the duplication of litigation that would have resulted merely because some of the plaintiffs lacked diversity, this action does not avoid such duplication. Accordingly, the Court shall not treat this action as a third party action for the purposes of the section 2675(a) exception.

Keene argues in the alternative that it has satisfied the administrative filing requirements of section 2675. Prior to the commencement of this action, Keene presented an Amended Notice of Claim[5] ("Amended Notice") listing the docket numbers of approximately 1000

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5. An undated "Notice of Claims" was submitted to the agencies on or about September 25, 1978. This initial notice was superceded by an "Amended Notice of Claim" ("Amended Notice"), which was filed prior to final administrative disposition of the initial notice.

lawsuits instituted against Keene for damages allegedly resulting from the exposure to asbestos fibers. This notice was presented to various agencies including the General Services Administration, the Department of Justice, the Judge Advocate General of the Army, the Department of Health, Education & Welfare, the Surgeon General, the Department of Defense, the Department of Labor, and the United States Public Health Service. By the time Keene filed this action, 1500 more lawsuits had been filed against it. A total of 6000 lawsuits had been filed by the time this Court heard oral argument on this motion.[6] Most of the lawsuits for which Keene seeks indemnification or contribution, therefore, are not encompassed

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6. As of November 1, 1980, 5,959 cases had been filed against Keene of which approximately 700 had been terminated by settlement, verdict, non-suit, or dismissal. Approximately forty-five new cases are filed against Keene each week. Affidavit of Howard Mileaf ¶ 5.

by the Amended Notice. Consequently, Keene's claims resulting from those lawsuits clearly cannot be considered under the FTCA. See Szyka v. United States Secretary of Defense, 525 F.2d 62, 65 (2d Cir. 1975); Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972).

With respect to the 1000 lawsuits for which purported administrative claims have been filed, the Government contends that the Amended Notice is defective because it fails to state a sum certain, see 28 C.F.R. § 14.2 (1980), and because it does not provide sufficient information to allow an investigation, see 28 C.F.R. § 14.4 (1980),[7] as

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7. The Government also contends that the Amended Notice is defective because it was not accompanied by evidence of the purported representative's authority to present a claim on behalf of Keene as required by 28 C.F.R. § 14.3(e). This request, however, appears to have been satisfied by a letter from Keene's chief executive, Glenn W. Bailey, to the Department of Justice that specifically authorizes Keene's lawyers to present claims on Keene's behalf.

required by the regulations promulgated pursuant to 28 U.S.C. § 2872.[8] There is a conflict among the circuit courts, however, over whether the administrative filing requirements of 28 U.S.C. § 2675 should be read in light of these regu-

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8. 28 U.S.C. § 2672 provides, in pertinent part, that

> [t]he head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

lations. The Fifth Circuit has ruled that these regulations do not apply to section 2675 because they bear solely on the procedures to be followed for the settlement of claims and not on the manner in which a claimant must present his or her claim. See Adams v. United States, supra, 615 F.2d at 288-293. In contrast, other circuits have applied the Justice Department regulations to determine whether a claimant has satisfied section 2675. See, e.g., House v. Mine Safety Appliances Co., supra, 573 F.2d 615-16; Lunsford v. United States, 570 F.2d 221, 225 (8th Cir. 1977); Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11, 19-20 (3d Cir. 1975). Although there does not appear to be any Second Circuit decision directly on point, district judges in this circuit have applied these regulations to section 2675. See, e.g. Luria v. C.A.B., 473

F. Supp. 242, 244 (S.D.N.Y. 1979) (Lasker, J.); Kantor v. Kahn, 463 F. Supp. 1160 (S.D.N.Y. 1979) (Sand, J.).

Despite this conflict over the relationship between sections 2672 and 2675, it is well established that a claimant must place a specific dollar amount on his damages. Adams v. United States, supra, 615 F.2d at 291 n.15.[9] It is clear that Keene has failed to satisfy this requirement. The Amended Notice does not seek a definite sum of money. Rather, Keene seeks $1,088,135 plus "an additional amount yet to be ascertained."[10] Claims for indetermin-

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9. In Adams, the Fifth Circuit construed section 2675 as requiring the notice of claim to include a specific amount of claimed damages. Other circuits have reached the same result through the "sum certain" requirement of 28 C.F.R. § 14.2 (1980). See, e.g., Caton v. United States, 495 F.2d 635, 637 (9th Cir. 1974).

10. Amended Notice of Claim at 13. Similarly, in its Amended Complaint,

(footnote continued)

ate damages simply do not satisfy the sum certain requirement. See, e.g., Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Raymond v. United States, 445 F. Supp. 740 (E.D. Mich. 1978); Wright v. United States, 427 F. Supp. 726, 727 n.2 (D. Del. 1977).

Keene responds that the Court may disregard the reservation as to future claims. See Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976). But see Mudlo v. United States, 423 F. Supp. 1373 (W.D. Pa. 1976). Even if the Court were to do so, however, the Amended Notice would still be deficient because it fails to particularize the damages requested for each individual lawsuit insofar as Keene seeks "costs,

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(footnote continued from previous page) Keene seeks "an amount presently unknown but which is believed to be in excess of $20 million." Amended Complaint at 36.

expenses, insurance premiums, attorneys' fees [and] the cost of executive time."[11]

There is another reason why the Amended Notice is insufficient. After Keene submitted the Amended Notice, the Justice Department, on its behalf and on behalf of the other agencies to which the Amended Notice had been sent, requested a more detailed statement from Keene pursuant to 28 C.F.R. § 14.4

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11. In this regard, the Court agrees with the Government's analogy to administrative tort claims made on behalf of a class of claimants. Although Keene has technically put forth only one claim, that claim si the aggregate of the one thousand separate claims that Keene could have filed for each individual lawsuit filed against Keene. In this respect, it is like a class action.

When an aggregate claim is made on behalf of a class of claimnants, the notice must state a specific amount for each claim. See, e.g., House v. Mine Safety Appliances Co., supra, 573 F.2d at 615; Luria v. C.A.B., supra, 473 F. Supp. at 245; Kantor v. Kahn, supra, 463 F. Supp. at 1164. Similarly, Keene must state the specific amount it seeks for each individual asbestosis lawsuit. Keene has failed to do this.

(1980). Specifically, the Justice Department requested a list of the amount of damages sought on each claim together with an itemization of various additional items of recovery sought by Keene in relation to each particular lawsuit. It also requested information regarding any insurance benefits that Keene might have recovered on these claims. Keene has not provided this information to the Government.

Once again, although there is a dispute over whether the regulations enacted pursuant to section 2672 apply to section 2675, compare Adams v. United States, supra, with Swift v. United States, 614 F.2d 812 (1st Cir. 1980), the Government, at a minimum, is entitled to sufficient information to enable it to evaluate the claim and choose between settlement and litigation. Adams v. United States, supra, 615 F.2d at 289. Claimants who fail to

respond to an agency's request for this information are treated as having not exhausted their administrative remedies and, consequently, cannot present their claims to a district court. See Swift v. United States, supra, 614 F.2d at 814; Emch v. United States, 474 F. Supp. 99, 103 (E.D. Wis. 1979), aff'd, 630 F.2d 523 (7th Cir. 1980), cert. denied, 101 S. Ct. 1482 (1981); Founding Church of Scientology v. F.B.I., 459 F. Supp. 748 (D.D.C. 1978). Keene's response that the Government is generally familiar with asbestosis litigation is insufficient. Although the Government may be on notice of the various theories on which Keene seeks contribution and indemnification, the Government is nevertheless entitled to specific information regarding each claim. See Founding Church of Scientology, supra, 459 F. Supp. at 758. The Government clearly cannot be expected to settle the

claims on an all or nothing basis. Moreover, the Government is not required to sift through the records of the individual lawsuits filed against Keene; the burden is on the claimant to supply the necessary information. See Kantor v. Kahn, supra, 463 F. Supp. at 1163.

Because Keene has failed to comply with the administrative filing requirements of section 2675, the Court cannot exercise subject matter jurisdiction over the claims asserted under the FTCA. We next consider Keene's claim of admiralty jurisdiction.[12]

Admiralty Jurisdiction

The Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 741 et seq., and the Public Vessels Act ("PVA"), 46

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12. These two theories of jurisdiction are mutually inconsistent. The FTCA specifically provides that it does not apply to suits in admiralty against the United States. 28 U.S.C. § 2680(d); see Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976).

U.S.C. § 781 et seq., constitute a waiver by the United States of its sovereign immunity against suits arising out of maritime incidents. Blanco v. United States, 464 F. Supp. 927, 930 (S.D.N.Y. 1979). Under the SIAA, the United States has waived sovereign immunity with respect to "cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742. By the PVA, sovereign immunity was further lifted with respect to "damages caused by a public vessel of the United States." 46 U.S.C. § 781. This aspect of the motion to dismiss, therefore, turns on whether Keene's claims against the United States come within this admiralty jurisdiction.

a. Tort Jurisdiction

We note at the outset that although the persons making claims against Keene were often exposed to asbestos in maritime settings, Keene's claims over against the United States result from actions and inactions taken in Washington, D.C. See note 3 supra. It is a very long stretch to convert these governmental decisions into admiralty torts. We shall proceed, however, on the assumption that the ultimate damage to Keene bears a remote relationship to admiralty.

The standard test for federal admiralty tort jurisdiction is (1) did the wrong occur on navigable waters, and (2) does the wrong complained of bear a significant relationship to traditional maritime activity. Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 254-61 (1972). The first part of the Executive Jet test, the situs requirement, however, must be read in

light of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 ("EAJA"), which extends jurisdiction to injuries that occur on land, so long as the injury was caused by a vessel or one of its appurtenances. See generally Victory Carriers, Inc. v. Law, 404 U.S. 202, 209-12 (1971). The EAJA does not affect the requirement that the wrong bear a significant relationship to traditional maritime activity. See Heim v. City of New York, 442 F. Supp. 35, 37 (E.D.N.Y. 1977).

A difficult aspect of this case is determining where the alleged wrong occurred. Keene alleges in Paragraph 13 of the Amended Complaint that "[m]ost of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, on vessels in navigable waters, and in power plants and other industrial and commercial plants,

including refineries." (Emphasis added). This allegation of various situs of injuries typifies the difficulty of bringing a consolidated action of this sort. The Court may not determine whether maritime jurisdiction exists as to the entire group of 6000 lawsuits, but must make its determination on a more individualized basis. Brown v. United States, No. 76-434, slip op. at 21 (D. Conn. July 23, 1979). Because the burden of establishing jurisdiction is on the party who asserts it, Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (1st Cir. 1980); Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87 (2d 1975), the Court could require Keene to make a more specific showing of jurisdiction. Rather than protract these proceedings any further,[13] how-

13. The Government initially noticed this motion in May of 1980. The Court did not receive the final papers on this motion until June, 1981.

ever, the Court has reviewed Keene's claim of admiralty jurisdiction generally and has determined that admiralty tort jurisdiction does not lie.

At the outset, the Court can eliminate all claims for lawsuits involving workers who were exposed to asbestos while working "in power plants and other industrial and commercial plants, including refineries." Amended Complaint ¶ 13. Although the EAJA extends admiralty jurisdiction to shoreside workers, the injury must still be "caused by a vessel on navigable water." 46 U.S.C. § 740; see Boudloche v. Conoco Oil Corp., 615 F.2d 687, 688 (5th Cir. 1980). The EAJA does not convert "'a classic nonmaritime, land-based injury into something else.'" Pryor v. American President Lines, 520 F.2d 974, 979 (4th Cir. 1975) (quoting Kent v. Shell Oil Co., 286 F.2d 746, 750 (5th

Cir. 1961), cert. denied, 423 U.S. 1055 (1976). Rather, there must be a proximate cause relationship between the injury and the vessel. Bailey v. Johns-Manville Corp., No. 77-1, slip op. at 5 (E.D. Va. March 30, 1978). That the asbestos was ultimately installed on a vessel does not establish the requisite proximate cause. Id.

With respect to those claims for lawsuits of plaintiffs who were exposed to asbestos while working on vessels in navigable waters, the Court must determine whether the installation of high thermal insulation around pipes and boilers bears a significant relationship to traditional maritime activity. The Court concludes that it does not.

The factors that are frequently considered in determining whether the tort alleged bears a significant relationship to traditional maritime activity include the functions and roles of

the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and the traditional concepts of the role of admiralty law. See Edynak v. Atlantic Shipping Inc., 562 F.2d 215, 220-21 (3d Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974); Otto v. Alper, 489 F. Supp. 953, 955 (D. Del. 1980); Montgomery v. Harrold, 473 F. Supp. 61 (E.D. Mich. 1979); Kayfetz v. Walker, 404 F. Supp. 75, 76-77 (D. Conn. 1975) (Lumbard, Cir. J.).

The function and role of the Government viz Keene was that of supplier of asbestos and purchaser of asbestos products. As the purchaser, the Government designed the specifications for the asbestos products. There is nothing in this relationship that is indigenous to maritime law. See

generally Baily v. Johns-Manville, supra, slip op. at 5.

The "vehicles involved" include naval ships and vessels. That these workers were exposed to asbestos on ships rather than in power plants or refineries was purely fortuitous. Moreover, it does not appear that these ships ever left the dock while they were being built or repaired. See Montgomery v. Harrold, supra, 473 F. Supp. at 64.

The cause and type of injury, exposure to asbestos, is certainly not unique to admiralty. Indeed, lawsuits stemming from the exposure to asbestos have arisen from a variety of industries. In Re Asbestos & Asbestos Insulation Material Products Liability Litigation, supra, 431 F. Supp. at 907. Moreover, Keene has not referred to anything in the traditional concepts of admiralty that would militate toward admiralty jurisdiction in this case.

There is simply no significant relationship between the hazards of asbestos and traditional maritime activity.

b. Contract Jurisdiction

Keene also contends that admiralty jurisdiction exists with respect to Keene's claims for breach of warranty sounding in contract. The Court rejects this claim of admiralty jurisdiction as well.

The general rule is that admiralty jurisdiction is limited to contracts that are related to a maritime service or a maritime transaction. See generally 1 Benedict on Admiralty §§ 182, 183 (1974 & Supp. 1980). "The mere fact that the services to be performed under a contract relate to a ship or its business, or that a ship is the object of such services, does not, in and of itself, mean they are maritime. The test to be applied in deciding

whether or not a contract is maritime is its nature and subject matter." P.D. Marchessini & Co. v. Pacific Marine Corporation, 227 F. Supp. 17, 18 (1974) (Weinfeld, J.). The contracts between the Government and Keene involved the purchase and sale of asbestos fiber and thermal insulation products. Although some of these products might have ultimately been used in the construction or repair of vessels, that fact alone will not convert a nonmaritime contract into a maritime contract.

FECA Claims

Many asbestosis claimants were employees of the United States working in naval shipyards when they were exposed to asbestos.[14] As such, their exclusive remedy against the United

14. The Amended Notice does not indicate how many claimants are or were employees of the United States Government. The Government needs this information to settle these claims.

States is pursuant to the Federal Employees Act ("FECA"), 5 U.S.C. § 8101 et seq. They are not precluded, however, from instituting suit against negligent third parties.

Keene seeks contribution or indemnity for the damages it has paid or will pay in those actions brought against it by Government employees. It is not clear what Keene's jurisdictional basis is for this claim. FECA does not constitute a waiver of sovereign immunity. Keene must therefore rely on FTCA, SIAA, or PVA jurisdiction, which for reasons already discussed, are not available to Keene.[15] Moreover, FECA bars suits by joint tortfeasors against the United

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15. Keene also alleges federal question jurisdiction. 28 U.S.C. § 1331. We summarily reject this claim of jurisdiction because it is well established that federal question jurisdiction is not a waiver of sovereign immunity. See, e.g., Estate of Watson v. Blumenthal, 586 F.2d 925 (2d Cir. 1978); Doe v. United States Civil Service Commission, 483 F. Supp. 539 (S.D.N.Y. 1980).

States for contribution or indemnity relating to a federal employee's injuries. See Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978);[16] Galimi v. Jetco, 514 F.2d 949 (2d Cir. 1975). See also Austin v. Johns-Manville Sales Corporation, 508 F. Supp. 313, 317 (D. Me. 1981); Oman v. Johns-Manville Corp., 482 F. Supp. 1060, 1069-71 (E.D. Va. 1980). To the extent that Keene seeks contract based immunity, its remedy is in the Court of Claims under the Tucker Act. See 28 U.S.C. §§ 1346(a)(2), 1491. Galimi v. Jetco, supra, 514 F.2d at 951.

In Counts 19 through 23 of the Amended Complaint, Keene seeks recovery of the amount of FECA benefits that the Government has recouped from asbestosis

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16. Although Zapico involved the "exclusive remedy" provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), that provision is nearly identical to that of FECA and has been construed in a similar fashion.

claimants. FECA provides that whenever a federal employee obtains a judgment on, or settles a claim arising out of his death or injury, the federal employee must reimburse the Government for its FECA payments. 5 U.S.C. § 8132. The Government's lien on its employees' recoveries from third parties is typical of workers' compensation programs.

Keene contends that it is entitled to the monies recouped by the Government because the Government played a significant role in causing the injuries to the asbestosis claimants. Keene sets forth five separate theories of recovery: Count 19 is a claim for damages based on unjust enrichment. Count 20 is a claim for restitution of money had and received. Count 21 is a claim for consequential damages arising from the Government's intentional conduct. Count 22 alleges an unconstitutional taking of property without due process of law.

Count 23 seeks to enjoin the Government from future violations of Keene's constitutional rights. Jurisdiction for Counts 19, 20 and 21 is alleged to exist under the FTCA and the SIAA. Keene alleges jurisdiction for Counts 22 and 23 under 28 U.S.C. § 1331, federal question jurisdiction.

Keene's assertion of FTCA and SIAA jurisdiction for Counts 19-21 must be rejected for the reasons discussed earlier. With respect to the claim under the FTCA, Keene has failed to satisfy the administrative filing requirements of 28 U.S.C. § 2675. Accordingly, the Court cannot exercise subject matter jurisdiction over Keene's claims under the FTCA. SIAA jurisdiction cannot be relied upon since there is no nexus between the Government's recoupment of its FECA liens and traditional maritime activities. Accordingly, the Court does not have

subject matter jurisdiction over Counts 19-21.

Keene's assertion of federal question jurisdiction for its constitutional claims must likewise be rejected. Keene relies primarily on the landmark case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which the Supreme Court first implied a private cause of action for damages arising out of a violation of constitutional rights by government officials. Bivens, however, does not stand for the proposition that the United States may be sued for constitutional violations. Norton v. United States, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). It authorizes actions only against the responsible federal official. Butz v. Economou, 438 U.S. 478, 504 (1978). Bivens type actions brought against the United States, therefore, are routinely

dismissed for lack of subject matter jurisdiction. See, e.g., Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 104 (2d Cir. 1981); Leonhard v. United States, 633 F.2d 599, 618 n.27 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3864 (U.S. May 18, 1981) (No. 80-1651). To the extent that the Court would have jurisdiction to hear Keene's constitutional claims, jurisdiction would lie under the Tucker Act, 28 U.S.C. 1346(a). Since Keene's claims exceed $10,000, jurisdiction lies exclusively in the Court of Claims. See Estate of Watson v. Blumenthal, 586 F.2d 925, 928 (2d Cir. 1978); 1 Moore's Federal Practice § 0.65 [2.-3] (2d ed. 1980).

Conclusion

It is clear that something must be done to decongest the courts from the

glut of asbestos related lawsuits.[17] Although the Court understands Keene's efforts to make the unmanageable more manageable, this action must be dismissed because Keene has attempted to do too much at one time, with too little jurisdiction. The doctrine of sovereign immunity, although commonly considered to be "dying," remains powerful and permits the United States to dictate the manner in which it may or may not be sued. United States v. Mitchell, 100 S. Ct. 1349, 1352 (1980). Because Keene has failed to satisfy the requirements for bringing suit against the United States, this action must be dismissed for want of subject matter jurisdiction.[18] Accordingly, the Government's

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17. It may be that the only practicable solution is a legislative one. Cf. Black Lung Benefits Act, 30 U.S.C. § 901 et seq.

18. In addition, to the extent that Keene seeks indemnity for actions that have not been terminated, the Court

(footnote continued)

motion to dismiss is granted.

SO ORDERED.

Dated: New York, N.Y.
September 30, 1981

GERARD L. GOETTEL
U.S.D.J.

(footnote continued from previous page) lacks subject matter jurisdiction because there is no case or controversy. See generally Forty-Eight Insulations, Inc. v. Johns-Manville Products Corp., 472 F. Supp. 385 (N.D. Ill. 1979).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEENE CORPORATION,	:	80 Civ. 401 (GLG)
Plaintiff,	:	
-against-	:	MEMORANDUM DECISION
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

On September 30, 1981, the Court dismissed this action for lack of subject matter jurisdiction. The plaintiff, relying on the Fourth Circuit's recent opinion in Glover v. Johns-Manville Corp., No. 80-1085 (4th Cir. Oct. 5, 1981), seeks leave to reargue this Court's ruling that the plaintiff's claims against the United States do not lie in admiralty. In addition, the plaintiff seeks to alter or amend the Court's order pursuant to Fed. R. Civ. P. 59(e) and seeks leave to file a

supplemental complaint pursuant to Fed. R. Civ. P. 15(d). All of these motions are denied.

1. Motion to Reargue

We note initially that the ground upon which the plaintiff seeks leave to reargue, that a subsequent Fourth Circuit decision is contrary to the view taken by this Court, is insufficient. The standard for granting a motion for reargument is whether "the court has overlooked 'matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the court." New York Guardian Mortgagee Corp. v. Cleland, 473 F. Supp. 409, 420 (S.D.N.Y. 1979) (quoting United States v. International Business Machines Corp., 79 F.R.D. 412, 414 (S.D.N.Y. 1978)); United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473

(S.D.N.Y. 1977). Because the decision cited by the plaintiff was rendered subsequent to the one in the case at bar, it clearly could not have been "overlooked." Moreover, a case from the Fourth Circuit is not a "controlling" decision in this district and, accordingly, is not a proper basis for reargument. United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473, 474 (S.D.N.Y. 1977). This Court has recently had the experience of following the opinion of another circuit's Court of Appeals (with which it did not agree) only to be emphatically reversed by the Second Circuit and told that reliance on the other circuit's decision was "misplaced." Doe v. New York University, No. 81-7680, slip op. at 27 n.7 (2d Cir. Nov. 24, 1981).

Finally, the Fourth Circuit's decision in Glover, even if applicable,

does not control the case at bar. Glover involved district court jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a) (1976), an issue that the plaintiff concedes is not relevant for present purposes. Interestingly, a case decided on the same day as Glover and not relied upon by the plaintiff in its motion to reargue, White v. Johns-Manville Corp., Nos. 79-1854, 80-1028/1140/1154/1227/1228 (4th Cir. Oct. 5, 1981), has greater relevance. In White, the Fourth Circuit ruled that admiralty jurisdiction attached to the claim of five shipyard workers who had developed asbestosis as a result of their exposure to asbestos dust and fiber. The instant case, however, is readily distinguishable. Whereas White involved five shipyard workers, this case involves over 9,000 claims, some of which involve workers who were exposed to asbestos "while working in power

plants and other industrial and commercial plants, including refineries." Amended Complaint ¶ 13. Another distinction is in the relationship between the parties. White involved claims by shipyard workers, who have an obvious connection with maritime activity, against the asbestos manufacturers. This case is more distant from traditional maritime activity. As we noted in the opinion, "Keene's claim over against the United States results from action and inaction taken in Washington D.C. . . . It is a very long stretch to convert these governmental decisions into admiralty torts." Keene Corp. v. United States, No. 80-401, slip op. at 13 (S.D.N.Y. Sept. 30, 1981).

2. Rule 59(e) Motion

Keene moves to amend the order to find jurisdiction over Keene's claims under the Federal Tort Claims Act

("FTCA"), 28 U.S.C. §§ 1346, 2671 et seq. Keene bases this motion on its submission of supplemental information concerning its claim against the government which, according to Keene, rectifies "virtually all" of the defects found by this Court.

We have not reviewed these recent submissions because we consider them premature. A claimant must first present his claim to the appropriate government agency and have his claim finally denied prior to instituting suit. 28 U.S.C. § 2675. If there is no agency action within six months, the claimant may treat the inaction as a final administrative determination. Failure to satisfy these requirements mandates the dismissal of the action. Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 104-05 n.9 (2d Cir. 1981).

Keene, relying on two recent FTCA cases, Kubrick v. United States, 435 F. Supp. 166, 189 (E.D. Pa. 1977), aff'd, 581 F.2d 1092, 1098 (3d Cir. 1978), rev'd on other grounds . 444 U.S. 111 (1979) and McCormick v. Cooley, 458 F. Supp. 776 (W.D. Pa. 1978), requests the Court to accept its proposed supplemental complaint at this time and hold the supplemental complaint in abeyance pending final agency action. Neither of these cases supports this unusual procedural request. They stand for the proposition that, when an action has been filed prematurely and the administrative claim is denied before there has been any "substantial progress" in the case, the court may deem the jurisdictional defect to be cured without requiring the claimant to refile the suit. They do not stand for the

proposition that the Court can warehouse a claim pending administrative review.*

The motions are denied.

SO ORDERED

Dated: New York, N.Y.
December 21, 1981

/s/
GERARD L. GOETTEL
U.S.D.J.

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* Keene also seeks leave to supplement its amended complaint to add the supplemental information that it recently submitted to the Government. In light of our conclusion that this action must be dismissed, there does not seem to be any purpose in granting leave to supplement the amended complaint. Accordingly, that application is denied.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

Federal Tort Claims Act,
28 U.S.C. §§ 1346(b),
2671-2680

28 U.S.C. § 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2672:

> The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions of tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be

final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2675:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Gov-

ernment while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The future of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

Public Vessels Act,
46 U.S.C. § 781:

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

Suits in Admiralty Act,
46 U.S.C. § 742:

In cases where if such vessel were privately owned or operated, or if such cargo were pri-

vately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel has been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

28 U.S.C. § 1333:

The district courts shall have original jurisdiction, exclu-

sive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

DEPARTMENT OF JUSTICE

STATEMENT

OF

J. PAUL McGRATH
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

EDUCATION AND LABOR COMMITTEE
SUBCOMMITTEE ON LABOR STANDARDS
HOUSE OF REPRESENTATIVES

CONCERNING

MANVILLE AND UNR BANKRUPTCY

ON

SEPTEMBER 9, 1982

Mr. Chairman and Members of the Subcommittee:

I am pleased to respond to the Subcommittee's request for the perspective of the Department of Justice on the asbestos litigation and on the recent filings for reorganization under Chapter 11 of the Bankruptcy Code by Manville Corporation and UNR Industries. Both of these entities are involved in extensive litigation concerning asbestos related diseases. As you are aware, the United States is involved in some of this litigation. The Civil Division of the Department of Justice is responsible for representing the interests of the United States both in the asbestos litigations and in insolvency proceedings.

The Government's Position in the Asbestos Litigation

The government's position in the pending asbestos litigations is that it

has no tort liability to the victims of asbestos-related diseases. If such victims were exposed to asbestos while they were government employees, then they may be compensated through the Federal Employees Compensation Act. If they were not government employees, then they must look to other workmen's compensation schemes or to litigation against their employer or others for compensation.

The United States is currently a defendant or third-party defendant in approximately 1,200 asbestos products liability actions involving nearly 13,000 individual claims. In the majority of these cases, plaintiffs have sued manufacturers and suppliers of asbestos-bearing thermal insulation products, and the defendant industry members have impleaded the United States seeking contribution and indemnity.

Approximately 80 percent of these third-party actions arose at government-owned or private shipyards.

Asbestos liability claims against the United States primarily stem from the activities of four federal agencies: the General Services Administration, the Labor Department, the Department of Health and Human Services, and the Navy Department. The principal asserted bases of liability against the government are that it sold asbestos without adequate warning or labeling, that it failed to warn the public about the dangers of asbestos exposure which government agencies had discovered and that it failed to provide safe working conditions at yards where ships were built for the Navy.

Government sales of asbestos were made from stockpiles of strategic goods. Asbestos was stockpiled by GSA as a

strategic and critical commodity essential to the national defense because industry required it to make insulation products marketed to the government and other users. Pursuant to express Congressional approval, between 1966 and 1974 GSA sold 55,000 tons of asbestos fiber from its stockpiles to the asbestos industry. GSA sales have accounted for only about one percent (1%) of the asbestos fiber used domestically since 1920. Since the strategic stockpiling program typically required the government to purchase material at high prices and sell at depressed prices, Congress mandated that GSA avoid preventable loss upon resale. Accordingly, in selling to the asbestos industry GSA operated on the reasonable assumption that the industry knew better than anyone how properly to use and handle asbestos fiber. Accordingly, GSA

officials determined to avoid the expense of repackaging and labeling the fiber prior to resale, and all sales to these knowledgeable purchasers were made "as is" without warranty of any kind. Such decisions are not a basis for charging the public treasury; instead any liability is properly placed on the industry members who made use of the asbestos.

The principal claims against HHS and Labor relate to inspection and enforcement activities. For example, the Department of Labor was authorized to carry out inspections of job sites in the enforcement of the Walsh-Healy Public Contracts Act of 1936 and the Occupational Safety and Health Act of 1970. The Department of Health and Human Services also has had various of its components responsible for conducting industry inspections, including the

National Institute for Occupational Safety and Health. In many of the pending cases it is charged that the findings of these studies were not communicated to workers in facilities where asbestos was used and that this gives rise to liability on the part of the government. The United States' efforts to improve the working conditions of Americans were never intended as a substitute for proper discharge of primary responsibility of private employers lest they relax their efforts. Moreover, government efforts to improve the general health and welfare should never form the predicate for tort liability lest such efforts be irrevocably chilled and the government be charged with the cost of abating the wrongs it attacks. Thus, it is the company which failed to provide a safe work site to which the worker must look for compensation.

Claimants have also sought to recover from the government on account of disease contracted from exposure to asbestos at shipyards. Until recent years, asbestos was used in great quantities in the construction of Navy ships. Navy ships were built both in government-owned shipyards and in yards owned by private contractors.

As for Naval shipyards, the government was responsible for providing a safe workplace for its own employees. Congress has provided benefits for these workers under the Federal Employees Compensation Act, and in that Act Congress clearly and unequivocally stated that the government's obligation under that Act is exclusive of any other.

Where disease was contracted at privately owned shipyards, it is our position that the government should not

be held liable for the torts of others, including its independent contractors. It should be noted, however, that the government has long sought to insure that workers at private shipyards could be compensated for work-related injury. Navy contracts required the contractors to secure workmen's compensation benefits under relevant state or federal law, and the contractor was permitted to charge back to the Navy all the costs of such coverage.

In summary, we believe Congress has clearly circumscribed the government's liability for these injuries. The Justice Department has vigorously and, to date, successfully enforced and supported those laws in the products liability litigation. At the same time it should also be noted that many alternative remedies have been provided to victims of asbestos exposure.

The Department of Justice's Role in the UNR and Manville Bankruptcy Matters

To date neither UNR nor Manville has scheduled the United States as a debtor or creditor in its filings, and so the United States has no immediate interest as a direct party in either proceeding. The United States, of course, will be considering whether it has any claims to be asserted in either proceeding. The bankruptcy proceedings may have the effect of staying litigations in which the United States has a direct or indirect interest or of transferring such litigations to the bankruptcy courts, but we have not yet taken a position on those procedural matters. We have those questions under study.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 82-1168

MARGARET AUSTIN, ETC.,

Plaintiff, Appellant,

v.

UNARCO INDUSTRIES, INC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Edward T. Gignoux,
U.S. District Judge]

Before

Coffin, Chief Judge,
Campbell and Bownes, Circuit Judges.

Patrick N. McTeague, with whom G. William Higbee, Maurice A. Libner, Thomas R. Watson, McTeague, Higbee, Libner, Reitman & Priest, Thomas W. Henderson, and Baskin and Sears were on brief, for appellant.

Thomas R. McNaboe, with whom Mark G. Furey, and Thompson, Willard & McNaboe were on brief, for Raybestos-Manhattan, Inc.

Peter W. Culley, Stephen C. Whiting, and Hewes, Culley, Feehan and Beals on brief, for Unarco Industries, Inc.

March 30, 1983

COFFIN, Chief Judge.

Factual and Procedural Background

This is an appeal of one segment of a complex collection of complaints by victims of asbestos-related cancer and their survivors against producers and suppliers of asbestos products used at Bath Iron Works from the mid 1950's until the early 1970's. Plaintiff's decedent, Blaine Austin, was employed at Bath Iron Works (BIW) from 1952 through the fall of 1976 as a painter and cleaner. He worked on board ships berthed in the Kennebec River at BIW, both on new ships berthed in the river after launching and on older ships brought into BIW for repair. His primary job was to follow behind the pipe-coverers, who applied asbestos insulation products to the ships' pipes, boilers and other machinery, and paint over the asbestos insulation. He was

also responsible for sweeping up asbestos scraps left by the pipecoverers. During both tasks, he breathed in asbestos fibers and dust created by the pipecoverers' cutting and shaping of the asbestos insulation. In November, 1976, plaintiff's decedent was diagnosed as having pleural mesothelioma, an asbestos-induced cancer of the lining of the lung. He died on October 13, 1977.

On June 14,1978, plaintiff brought suit in the United States District Court for the District of Maine against a number of suppliers of asbestos to Bath Iron Works. Her complaint alleged jurisdiction based on diversity of citizenship and causes of action under Maine law in negligence, strict products liability and breach of warranty. Approximately 140 other complaints by present and former employees of either Bath Iron Works or Portsmouth Naval Shipyard, or their widows, were filed in the same

court near the time plaintiff filed her complaint.

A number of the pretrial proceedings relating to the complaints of four of the plaintiffs, all based on injuries incurred at BIW, were consolidated. In May of 1981, five defendants moved for summary judgment against those four plaintiffs, based on the statute of limitations, lack of the privity of contract required under Maine law as a prerequisite to recovery for pre-1979 negligence or breach of warranty, and the inapplicability of Maine's strict liability statute to claims based on products supplied before the effective date of the statute, October 3, 1973. On August 7, 1981, the court granted the motions with a few minor exceptions. Plaintiff's claims against three of the manufacturer defendants, Johns-Manville Sales Corp., Unarco Industries, Inc. (Unarco) and Raybestos-Manhattan (Ray-

bestos), were not disposed of on summary judgment and were tried together, beginning on November 2, 1981. Plaintiff and defendant Johns-Manville settled during the course of the trial.

At the close of plaintiff's evidence, defendant Unarco moved for a directed verdict on plaintiff's strict liability and breach of warranty claims. Defendant Raybestos made a similar motion at the close of all of the evidence. As to the breach of warranty claim, plaintiff indicated that she no longer intended to press the claim. She requested the [sic] the strict liability count not be dismissed, but acknowledged that under Maine law, it appeared that a claim in strict liability could not be made based on products supplied before October 3, 1973. The court granted both motions, finding insufficient evidence that either defendant had supplied asbestos products to BIW prior to Octo-

ber 3, 1973 to warrant submitting the strict liability issue to the jury.

At the close of all of the evidence, plaintiff moved to strike defendants' comparative negligence defense. Defendants had introduced evidence that the decedent could have worn a respirator that would have reduced his risk of cancer, but that he had failed to do so. Plaintiff argued, in support of her motion, that there was insufficient evidence that plaintiff's decedent was aware that exposure to asbestos could cause serious disease; thus, he could not have been negligent in failing to wear a respirator. The court denied the motion.

After five weeks of trial, the jury returned a verdict in favor of defendants. The jury found that both Unarco and Raybestos were guilty of negligence that proximately caused Blaine Austin's mesothelioma and death, but that Austin

was contributorily negligent and that his negligence was equal to or greater than that of the defendants. Under Maine's comparative negligence statute, therefore, recovery was barred. Judgment was entered for the defendants on December 8, 1981.

On December 11, 1981, plaintiff filed a motion for a new trial, alleging that the jury verdict was against the weight of the evidence. On December 17, 1981, plaintiff filed a motion for judgment n.o.v., alleging that there was no evidence that the decedent was contributorily negligent or, in the alternative, that the verdict was against the weight of evidence. The court denied both motions.

Plaintiff appealed to this court from the judgment against her and from a number of alleged errors in the proceedings below. After the filing of that appeal, but before argument, de-

fendant Unarco filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Reform Act, 11 U.S.C. § 101 et seq., in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. Upon notification of that petition, on August 5, 1982, this court stayed further proceedings in this appeal pending a final determination by the Bankruptcy Court. On October 1, 1982, the Bankruptcy Court issued an order authorizing plaintiff to pursue her appeal in this case against parties other than Unarco. The court noted that plaintiff had not sought to have the stay lifted against defendant Unarco, but determined that the automatic stay provisions of 11 U.S.C. § 362 do not apply to the bankrupt defendant's solvent co-defendants. Plaintiff now seeks to pursue her appeal against Raybestos alone. Before proceeding to the merits of this appeal, we

address defendant's contention that plaintiff should not be allowed to proceed against it alone.

I. Lifting of the Stay

The first issue before us is whether we should decide the merits of this appeal. On August 5, 1982, we stayed all proceedings in this case, pending a final determination by the Illinois Bankruptcy Court of the Chapter 11 bankruptcy proceeding voluntarily initiated by Unarco, one of the original co-defendants in this case. Since that time, the Bankruptcy Court has made clear its position that the automatic stay of all proceedings against bankrupt debtors provided by § 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), applies only to the debtor and not to the debtor's solvent co-defendants. On the basis of that ruling, the plaintiff requested and received from the Bank-

ruptcy Court on October 1, 1982, an order authorizing her to pursue her appeal in this court as to parties other than Unarco. On October 20, 1982, plaintiff requested this court to lift its stay of August 5, 1982 and to allow the appeal to proceed against Raybestos alone.

Raybestos does not urge that the Bankruptcy Court was wrong in deciding that the automatic stay provisions of 11 U.S.C. § 362(a) apply only to the bankrupt debtor and not its solvent co-defendants. It argues, instead, that Unarco is a necessary party and that particularly because plaintiff made no effort to have the stay of proceedings against Unarco lifted, she should not be allowed to proceed against Raybestos alone.

As an initial matter and because we expect that the issue will arise again in this circuit, we express our judgment that the Bankruptcy Court was correct in

deciding that the automatic stay provisions of 11 U.S.C. § 362(a) apply only to the bankrupt debtor. We are persuaded by the reasoning of the Illinois Bankruptcy Court in Royal Truck and Trailer, Inc. v. Armadora Maritima Salvadorena, S.A. de C.V., 10 B.R. 488 (Bankr. N.D. Ill. 1981), and by a comparison of the stay provisions provided by Congress for a chapter 13 bankruptcy proceeding, which expressly include co-defendant debtors, with those provided for a chapter 11 bankruptcy proceeding, which make no mention of co-defendant debtors, that had Congress intended § 362(a) to apply to solvent co-defendants, it would have said so. See also In re: Related Asbestos Cases, No. C-79-3588 R.F.P., Slip op. (N.D. Cal. September 23, 1982); Aboussie Bros. Construction Co. v. United Missouri Bank of Kirkwood (In re Aboussie Bros. Construction Co.), 8 B.R. 302 (Bankr. E.D.

Mo. 1981). Courts that have come to a different conclusion do not appear to have done so on the basis that § 362 requires such a result, but rather that additional considerations warrant a stay as to all defendants. See, e.g., Federal Life Ins. Co. (Mutual) v. First Financial Group of Texas, Inc., 3 B.R. 375 (S.D. Tex. 1980) (claims too interwoven to sever, although the bankruptcy court has authority to lift the stay as to less than all of the defendants); Rupp v. Cloud Nine Ltd. (In Re Cloud Nine, Ltd.), 3 B.R. 202 (Bankr. D.N.M. 1980) (relief from stay "will result in at best only a partial resolution of the issues and at worst will further complicate the issues and result in needless relitigation"); In re White Motor Credit Corp., 11 B.R. 294, 295 (Bankr. N.D. Ohio 1981) ("for many reasons (perhaps including section 362 itself), products liability plaintiffs

cannot dismiss a reorganization debtor and proceed against co-defendants only"). We agree that there might be cases in which additional considerations warrant a refusal to lift the stay as to some but not all of the co-defendants; we disagree only with the assertion that those considerations should be read into § 362. It is to those additonal [sic] considerations that we now turn.

Defendant argues that Unarco is a necessary party to this litigation and therefore that we should not allow the appeal to proceed against Raybestos alone. It urges that we apply standards analogous to the necessary and indispensable party criteria of Fed. R. Civ. P. 19. We agree that despite the absence of a specific rule of appellate procedure authorizing the court to delay review in the absence of necessary parties, the court has the power to make such a determination. We do not agree,

however, that this is a case warranting such delay. Joint tortfeasors are not considered indispensable parties under federal law. See Field v. Volkswagenwerk AG, 626 F.2d 293, 298 n.7 (3d Cir. 1980); Jett v. Phillips & Associates, 439 F.2d 987 (10th Cir. 1971); Herpich v. Wallace, 430 F.2d 792, 817 (5th Cir. 1970). The plaintiff will not be afforded incomplete relief. If she prevails on appeal and is entitled to a new trial on any of the issues she raises, she will be able to assert her full claim against Raybestos, leaving Raybestos to proceed against Unarco for contribution. Whatever prejudice results to Raybestos from being forced to proceed without Unarco is simply that inherent in the principle of joint and several liability.

Even absent a determination that Unarco is an indispensable party, we could stay the proceedings in the in-

terest of judicial economy and fairness to the parties. The Supreme Court has indicated, however, that to be entitled to a stay, a party must demonstrate a clear case of hardship if there is a danger that the stay will damage the other party. Landis v. North America Co., 299 U.S. 248, 255 (1936); Dellinger v. Mitchell, 442 F.2d 782, 786-88 (D.C. Cir. 1971). In this case, the damage to the plaintiff would be the financial hardship of being forced to wait for an undefined but potentially lengthy period before receiving the money to which she may be entitled. An additional consideration is that this is only one of a number of similar cases that have been and will be brought in the federal courts. In a number of those cases, plaintiffs and crucial witnesses are dying. We are not persuaded that the hardship to defendants of having to go forward on this appeal without Unarco,

or the interests of judicial economy in avoiding relitigation of the issues, are strong enough to justify forcing plaintiff and a number of other plaintiffs to wait until bankrupt defendants are successfully reorganized in order to be able to pursue their claims. We proceed, therefore, to the merits.

II. Refusal to Apply Admiralty Law

Plaintiff's first claim of error below is that the trial judge refused to accept the applicability of admiralty law to her claims against the defendant manufacturers. The error was particularly harmful, according to plaintiff, because it resulted in application of Maine's comparative negligence statute, pursuant to which the jury found the decedent at least 50 per cent responsible for his own injuries and thus denied recovery. Under admiralty law, plaintiff claims, she would not have

been denied all recovery on a negligence claim unless her husband was 100 per cent responsible for his own injuries and under a strict liability claim unless the jury found that he knowingly and unreasonably assumed the risk of his own injuries.

A. Procedural Bar

A threshold question is whether, as defendant urges, plaintiff is barred from raising the issue of admiralty law[1]

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1. In the memorandum accompanying her motion to amend, plaintiff used "admiralty law" and "admiralty jurisdiction" interchangeably. She expressly noted, however, that "[b]y arguing for a determination that admiralty law applies, plaintiff by no means intends to waive [her] right to a jury trial. Since there is also diversity jurisdiction, plaintiff is entitled to a trial by jury. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)." It appears, therefore, that what plaintiff wanted was to have admiralty law control her action which was properly before the court as a suit based on diversity jurisdiction.

Executive Jet set out a test for the invocation of admiralty jurisdic-

(footnote continu

because of the lateness of her motion to amend. A recitation of relevant events is necessary for an understanding of why

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(footnote continued from previous page)
tion, rather than for the application of admiralty law. Nevertheless, for our purposes, it appears that the tests are the same, since, in general "[o]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable." Brance v. Shumann, 445 F.2d 175, 178 (5th Cir. 1971). This is true even when the plaintiff decides to pursue her claim in the civil side of a federal court or in a state court. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); G. Gilmore & C. Black, The Law of Admiralty § 6-5 at 279 (2d ed. 1975).

The Supreme Court has recognized that the states do not lose all concern for their land-based workers, even though their injuries may be considered maritime. See Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961). Thus, admiralty sometimes borrows or draws on state law in deciding issues in which the state has a strong interest. See, e.g., In re Dearborn Marine Service, Inc., 499 F.2d 263, 277 n.27 (5th Cir. 1974), and cases cited therein. While state law may supplement admiralty law, however, it may not flatly contradict it and is generally referred to only when it affords greater protection to maritime employees than that afforded by admiralty law. See Pope & Talbot, Inc. supra, 346 U.S. at 409-10; Gilmore & Black, supra, § 1-17 at 49.

we have decided to address the merits of the admiralty law issue.

Plaintiff filed her complaint in June of 1978, alleging diversity of citizenship and basing her claims on Maine's Wrongful Death and Survival Statutes. On August 10, 1981, the court set the trial date for October 19, 1981, discovery to be completed by October 1, 1981. On September 30, 1981, the trial date was moved back to November 2, 1981, the jury to be impaneled on October 19. Plaintiff's first formal motion to amend her complaint to allege admiralty law was made on October 9, 1981. On the same day, the trial judge held a pre-trial conference at which he considered and denied plaintiff's motion to amend. In his report of the pretrial conference he noted defendant's objections to the motion: "That [it] had received insufficient notice to be prepared to brief and argue the merits of the jurisdic-

tional question and that the motion was not timely filed inasmuch as the action has been pending in this Court since June 1978, that all counsel have prepared for trial of the action as a diversity action in which Maine law would apply, and the action has been assigned for trial commencing on Monday, November 2, the jury to be impaneled on Monday, October 19." He noted that "[a]fter hearing counsel, over objection of plaintiff, the court denied plaintiff's motion. The court endorsed its action on the original motion."

Fed. R. Civ. P. 15(a) provides that "leave [to amend] shall be freely given when justice so requires." The Supreme Court has emphasized that the motion to amend ordinarily should not be denied "[i]n the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962). Defendant urges that we read the trial judge's report of the pretrial proceedings as an implicit acceptance of its arguments that a granting of the motion to amend would unduly prejudice it. Were these events all that had occurred, we would be inclined to agree that the recitation of the defendant's arguments is, if not a declared, at least an apparent and justifiable reason for denial of the motion. Defendant insists that, in addition to the delay and expense that would be required to brief the admiralty law issue, some of the discovery already completed by it would have had to be duplicated, because admiralty law does not have Maine's $10,000 ceiling on damages recoverable

for loss of consortium. In addition, much of defendant's trial preparation based on Maine law would have had to be discarded and a last ditch effort made to prepare for trial on the liability and damages standards applicable under admiralty law.

Plaintiff, however, insists that the October motion to amend cannot be taken in isolation. She points to the fact that she had made an earlier, unsuccessful effort, in June of 1981, to allege admiralty law and the trial judge made a substantive ruling that admiralty law did not apply to her claims. Thus, she argues, it would have been fruitless for her to move to amend her complaint prior to October when the law on which the judge relied in denying her earlier request was changed; she should not be penalized for the lateness of her motion; and any threat of prejudice to the defendant could have been relieved by a

granting of the motion for a continuance which she made shortly after her motion to amend.

The manner in which the issue of admiralty law was earlier raised is as follows. A number of defendants in the consolidated asbestos actions, but not including the defendants here, had moved for summary judgment against the four plaintiffs whose cases had been consolidated for pretrial proceedings. The motions for summary judgment were based, among other things, on the lack of the privity of contract required under Maine law for claims based on negligence, breach of warranty and strict liability.[2] In their consolidated response to the motions for summary judgment, plaintiffs contended that the actions were governed by admiralty law and

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2. For further discussion of the privity requirement for a claim based on Maine's strict liability statute see Section III A, infra.

therefore not barred by a requirement of privity of contract. They noted that they would amend their complaints to allege admiralty jurisdiction should the Court sustain their contention. The court rejected plaintiffs' contention as to admiralty law and with certain exceptions not significant here, granted the motions for summary judgment.

Defendant understandably argues that this procedural history should not be considered because it was not a party technically involved in the motions for summary judgment. But the circumstances of this massive litigation, and of the court's ruling on plaintiff's request, cast doubt on the propriety of such a narrow interpretation. In his August 7, 1981 ruling on the motions for summary judgment, the trial judge noted that the motions were by five defendants against four of approximately 140 plaintiffs who had filed actions against various as-

bestos manufacturers and suppliers. Actions against a number of defendants were generally combined in the numerous pretrial proceedings held by the court. In fact, although not a party to the motions for summary judgment that prompted plaintiff's first request that the judge find admiralty law controlling, counsel for defendant Raybestos was present at the hearing held on the admiralty issue and participated in a colloquy with the judge on the merits of plaintiff's request. In addition, in ruling on the issue, the judge made a substantive determination which could reasonably have been interpreted by plaintiff as applying to all of the claims by plaintiff against the defendant asbestos suppliers and manufacturers, not just to the parties to the motion for summary judgment. The judge held that:

> "Federal admiralty law does not govern these actions. In

> the first place, plaintiffs in their complaints have not invoked admiralty jurisdiction under 28 U.S.C. § 1333(1), nor have they met the procedural requirements of Fed. R. Civ. P. 9(h). In any event, the product liability tort claims asserted by plaintiffs in these cases -- the failure to warn of the dangers of asbestos -- bear no 'significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,' a prerequisite to the maritime tort jurisdiction of the federal courts. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Accord, Bailey v. Johns-Manvile [sic] Corp., 1978 A.M.C. 1460 (E.D. Va. 1978)."

On October 5, 1981, the United States Court of Appeals for the Fourth Circuit ruled, in White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), that federal admiralty law did apply to a claim by shipyard employees against manufacturers of asbestos products. Taking that case, justifiably, as a discrediting of Bailey v. Johns-Manville Corp., 1978 A.M.C. 1460 (E.D. Va.

1978), on which the court had relied, the plaintiff moved to amend her complaint. The court denied the motions, noting that it "endorsed its action on the original motion."

The fact that the court had made, at least in part,[3] a substantive determination on the merits of the admiralty

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3. The court's other concern, that plaintiffs had not invoked admiralty jurisdiction under 28 U.S.C. § 1333(1), nor had they met the procedural requirements of Fed. R. Civ. P. 9(h), was misplaced. A plaintiff may plead only diversity jurisdiction but also allege that admiralty law governs. See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359-60 (1962); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953); Edynak v. Atlantic Shipping, Inc. CIE. Chambon, 562 F.2d 215, n.11 (3d Cir. 1977); 7A J. Moore, Moore's Federal Practice ¶¶ .53[2]-[3] at 389; id., ¶ .59[3] at 418. See also note 1, supra. The court's ruling also probably accounts for the fact that in her October 9, 1981 motion to amend, plaintiff pleaded admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1); 46 U.S.C. § 740 and Fed. R. Civ. P. 9(h). Contrary to the suggestion of defendant, it is clear from her accompanying memorandum that she did not intend, by invoking Fed. R. Civ. P. 9(h), to deprive defendant of a jury trial.

issue puts plaintiff in a somewhat stronger position than had her motion simply been denied. Although the court was certainly not bound to accept the reasoning of the Court of Appeals for the Fourth Circuit, we are inclined to agree with plaintiff that prior to White there would have been little point in attempting to amend her complaint against the defendant whose case is at issue here. In addition, had her June reguest [sic] to amend been granted, she would no doubt have alleged that admiralty law governed all of her claims, including those against defendant here. Thus, we feel constrained to judge the propriety of the denial of the motion to amend as of June when she first requested it.

As of June, defendant's claim of eleventh hour prejudice has much less merit. Discovery had not been completed and it would have had adequate time to

prepare for trial on the basis of admiralty law. Nor did the court rely on prejudice in denying the plaintiff's request. It apparently determined, instead, that the requested amendment would have been futile. While we agree that futility may be a proper reason for denying a motion to amend, see Foman, supra, 371 U.S. at 182, we do not think that it was a valid one in this case. To explain why, we, like the trial judge, must reach the merits of the admiralty jurisdiction issue.

B. Merits of the Admiralty Jurisdiction Issue

In Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972), the Supreme Court rejected the traditional "strict locality" test for admiralty tort jurisdiction and required also that

"the wrong bear a significant relationship to traditional maritime activity." Id. at 268. While it appears that the injury must generally still occur on navigable waters, the claim here clearly meets the locality prong of the Executive Jet test. The ships on which the plaintiff worked and where he was injured were situated in navigable waters -- in the Kennebec River. The only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity.

In addressing this question, we note that there is already some disagreement among the circuits both as to the proper analysis and as to the ultimate resolution of the issue. See Keene Corp. v. United States, No. 82-6023, Slip op. (2d Cir. Feb. 10, 1983) (admiralty jurisdiction not proper over indemnity suit by asbestos manufacturer against the government for, inter alia,

designing and specifying asbestos insulation products and failing to inspect the workplaces); Owens-Illinois, Inc. v. United States District Court for the Western District of Washington, No. 83-7012, Slip op. (9th Cir. Jan. 25, 1983) (admiralty jurisdiction not proper over claim by shipyard worker against asbestos manufacturer); White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981) (admiralty jurisdiction proper over claim by shipyard worker against asbestos manufacturer). For reasons set out below, we disagree, in part, with the analysis of all three courts, but we are persuaded that the result reached by the Second and Ninth Circuits is sound.

The issue that appears to be creating the most confusion in this situation is whether Executive Jet requires that there be some maritime flavor to the manufacture or supply of the offending asbestos product. The Second Cir-

cuit, in Keene Corp., supra, Slip op. at 1708, focused on two critical elements in determining that the acts and omissions alleged were not sufficiently related to traditional maritime activity:

> "First, Keene does not allege that its insulation was designed specifically for maritime use. . . . Second, many of the roles attributed to the government and allegedly giving rise to Keene's cause of action -- the government's sale of asbestos to Keene, its specification of asbestos as a component of insulation it purchased from Keene, its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations -- do not bear a significant relationship to traditional maritime activities such as 'navigation and commerce.'"

Similarly, The Fourth Circuit, in White v. Johns-Manville, 662 F.2d 234 (4th Cir. 1981), found admiralty juriisdiction [sic] proper, but limited its holding to situations where "the materials used by the shipyard workers were designed, advertised, and marketed

as maritime asbestos products." 662 F.2d at 240.

Our reluctance to require that there be some independent connection between the manufacture of the product and traditional maritime activity stems from the fact that in other contexts, where, for instance, a defective product causes a ship to sink, courts have extended admiralty jursidction [sic] to manufacturers regardless of their intent or knowledge that their product would be used on a ship. In Sperry Rand Corp. v. RCA, 618 F.2d 319 (5th Cir. 1980), the court found admiralty jurisdiction proper over the manufacturer of a component part of a marine gyro-pilot steering system, even though the part was not specifically manufactured for marine use. The court reasoned that it made little sense to extend admiralty jurisdiction over the injured party's claim against the steering system man-

ufacturer, but not over the steering system manufacturer's claim for contribution from the manufacturer of the component part. Similarly, in Jones v. Bender Welding & Mach. Works, Inc., 581 F.2d 1331 (9th Cir. 1978), the court upheld admiralty jurisdiction over the claim of a vessel owner against a manufacturer of engines, even though it was another defendant who adapted the engine for maritime use. See also In re Queeny/Corinthos, 503 F. Supp. 361, 363 (E.D. Pa. 1980), where the court asserted admiralty jurisdiction over a products liability cross-claim by a vessel owner against manufacturers of component parts of the ship's engine, giving no indication of whether those parts were designed for maritime use. The court emphasized the importance of having "power to adjudicate all of the demands made and arising out of the same disaster." Most recently, the Fifth

Circuit has applied similar reasoning to find admiralty jurisdiction proper in a products liability suit airising [sic] from the crash of a seaplane, despite the lack of maritime flavor to the alleged defective design of the aircraft. As the court noted,

> "There are . . . patent difficulties in determining what kinds of 'wrong' are related to traditional maritime activities. If we define the 'wrong' as the negligent act, then it is difficult to see how defects in the design of an aircraft, faults in its manufacture or maintenance, or pilot error are maritime. Yet we, as well as other courts, have asserted admiralty jurisdiction over such claims. Those who advocate a 'relationship of the wrong' test really look not to the kind of wrong but to the nature of the activity in which the victim and his aircraft are engaged.
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> . . . .
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> In products liability cases . . . [t]he place where the negligence or wrongful act occurs is not decisive. The place injury occurs and the function the injured person was performing at the time are more significant." Smith v. Pan Air Corp., 684 F.2d 1102,

1107, 1111 (5th Cir. 1980) (citations omitted).

We think the approach of these courts is sound. If products liability claims are to be heard in admiralty, and it seems clear that they are, see Smith v. Pan Air Corp., supra, 684 F.2d at 1111 n.33 and cases cited therein; see also Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966), vacated and remanded, 388 U.S. 459 (1967), on remand, 390 F.2d 353 (9th Cir. 1968) (implicit Supreme Court approval of admiralty's acceptance of land based products liability law), then whatever advantage accrues from a uniform national law governing those cases would be severely undercut by distinguishing between manufacturers according to whether they designed or intended their products for maritime use.

For similar reasons, we find misplaced any reliance on whether the con-

tract between the manufacturer and shipbuilder was for ship construction, which is non-maritime, or for ship repair, which is maritime. Determining what would be the nature of a contract dispute between Bath Iron Works and Raybestos sheds little light on the nature of this products liability claim.[4] Several courts apparently agree. See, e.g., Jig the Third Corp. v. Puritan Marine Ins. Corp., 519 F.2d 171, 174 (5th Cir. 1975) ("When an oceangoing shrimpboat sinks in 15 fathoms of water in the Gulf of Mexico and the sinking is allegedly tortious, there is maritime activity, and the tort, if recognized by the law, is maritime in nature. . . . This would be true even though the con-

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4. We agree that the traditional admiralty distinction between ship building and ship repair may shed light on the nature of the injured worker's activity and thus be relevant to the inquiry required by Executive Jet. See note 5, infra. Our concern here is with a distinction based on the nature of the manufacturer's activity.

duct complained of may have been negligent construction or defective design and may have occurred ashore. Watz v. Zapata Off-Shore Co., 431 F.2d 100, 112-14 (5th Cir. 1970); Sears, Roebuck & Co. v. American President Lines, Ltd., 345 F. Supp. 395, 402 (N.D. Cal. 1971); Taisho Fire & Marine v. Vessel Montana, 335 F. Supp. 1238, 1239 (N.D. Cal. 1971); In re Alamo Transp. Co., 320 F. Supp. 631, 634 (S.D. Tex. 1970).

Concluding, therefore, that it is not fatal to plaintiff's allegation of admiralty jurisdiction that hers is a products liability claim against a manufacturer with no independent connection to maritime activity, we turn to plaintiff's decedent's activity.

Defendant concedes that if the asbestos products had caused a ship to sink, or had caused injury to a crewmember or passenger, admiralty jurisdction [sic] would be proper. It

argues, however, that the decedent's work was not significantly related to traditional maritime activity involving navigation and commerce, as required by the Court in Executive Jet; that injuries to shipyard workers are not a traditional concern of admiralty law; and that the policy justifications for a uniform maritime law do not support admiralty jurisdiction in this case. After much reflection, we agree.

The Court in Executive Jet emphasized the traditional concerns and expertise of the admiralty courts:

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe.

> Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage." 409 U.S. at 270.

Included within those traditional concerns of admiralty are the care and safety of those exposed to the hazards of maritime service. One of the justifications the Executive Jet Court discussed for abandoning the "strict liability" rule for maritime torts is the number of times the courts and Congress have had to create exceptions to the rule, particularly in cases of personal injury, where the tort had no maritime locality, but did bear a relationship to "maritime service, commerce, or navigation." 409 U.S. at 259 (emphasis added). As examples, the Court cited the application of the Jones Act to injuries

to a seaman on land, because of the seaman's connection with maritime commerce, see O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 43 (1943), and the extension of the doctrine of unseaworthiness to cover injuries sustained on land by a seaman or a longshoreman, see Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). The court also cited Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914), as a case in which the claim had a sufficiently close relationship to traditional maritime activity.

In Atlantic Transport Co., the Court upheld admiralty jurisdiction over a stevedore's negligence claim against his employer. The Court cited the locality rule, but then went on to say that:

> "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was

> the subject of the suit was, we think, of a maritime nature. . . . The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'" Id. at 61-62 (citations omitted).

Thus, it appears that personal injuries to seamen and others doing seamen's work do fall within the traditional concerns of admiralty law and are claims over which admiralty tort jurisdiction would be proper. The remaining issue, however, is whether plaintiff's decedent should be considered to have been per-

forming traditional maritime service when he was injured. On that question, we find helpful the Supreme Court's decisions regarding which workers should be entitled to the special admiralty-confined warranty of seaworthiness and for what sorts of injuries.

The justification for admiralty's special no-fault protection for maritime injuries is that:

> "Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. . . . [Thus] the owners owe [] [sic] to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and . . . for failure to discharge such duty there [is] liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof." The State of Maryland, 85 F.2d 944, 945, quoted in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 91-92 n.9 (1946).

Two observations may be made about the application of this policy. The

first is that unseaworthiness can arise not only from something as nautical as a faulty anchor windlass but from something as unmaritime as the presence on a ship of a hazardous chemical. See, e.g., Smith v. Ithaco Corp., 612 F.2d 215 (5th Cir. 1980) (unseaworthiness claim based on seaman's exposure to benzene fumes escaping from the ship's storage tanks); Martinez v. Dixie Carriers, Inc., 529 F.2d 457 (5th Cir. 1976) (unseaworthiness claim based on exposure to noxious fumes escaping from the chemical tank of a barge).

A second, and perhaps more immediately pertinent observation is that the policy protects not only seamen but, by judicially created extension, those who are serving the same functions as seamen would serve; otherwise a vessel owner might be able to frustrate the policy by subcontracting chunks of a seaman's job

to others. But the limits of the extension are narrowly circumscribed.

The seaworthiness remedy has been extended to some harbor workers, see Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbort [sic], Inc. v. Hawn, 346 U.S. 406 (1953), but only if those harbor workers were injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen, see United New York and New Jersey Sandy Hooks Pilots Ass'n v. Halecki, 358 U.S. 613 (1959). See also West v. United States, 361 U.S. 118 (1959) (focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done); Waganer v. Sea-Land Service, Inc., 486 F.2d 955, 958 (5th Cir. 1973) (two-fold requirement for unseaworthiness recovery: "(i) the ship in question must have been in nav-

igational status, and not 'dead', which in turn depends upon whether the contracted work is minor or major, and who was custody and control of the ship while the work is being done; and (ii) the pattern of repair must reflect work traditionally and ordinarily done by seamen, excluding persons performing such tasks as making major repairs requiring drydocking or special skills").

The distinctions drawn in the seaworthiness context, according to the work performed by the injured party and the hazards encountered by him, counsel against admiralty jurisdiction in this case. Under the tests set out above, plaintiff's decedent would plainly be excluded. The ships on which he worked were out of navigation and the work was major, requiring special equipment and skills.[5] It was not work traditionally

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5. The Ninth Circuit has reached a similar conclusion by focusing on the

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done by members of the crew. More important, if the reason for admiralty's special concern for the care and safety of seamen is that they are exposed to

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ship repair/ship construction distinction used to determine whether a contract dispute is in admiralty or at law. See Owens-Illinois, supra, Slip op. at 5-6; see also Hollister v. Luke Construction Co., 517 F.2d 920, 921 (5th Cir. 1975) (because a contract to build a ship is non-maritime, an injury to a welder during the course of that construction lacks maritime flavor). While we agree that the contract cases are relevant and that the Supreme Court has in the past relied on them to distinguish between workers whose connection to maritime activity was too tenuous to warrant displacing state law, see Grant Smith Porter Co. v. Rohde, 257 U.S. 469 (1922), reliance on them, rather than on the work actually performed by the injured party may lead to arbitrary distinctions. See Halecki, supra, 358 U.S. at 617-18 ("It avails nothing to say that the decedent was an 'electrician' and that many modern ships carry electricians in their crew. Pope & Talbot v. Hawn explicitly teaches that such labels in this domain are meaningless. . . . It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is . . . that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else

(footnote continu

the peculiar hazards of the sea and a vessel's equipment, then the dangers faced by a shipyard worker installing asbestos insulation are scarcely traditional concerns of admiralty or is there any reason to expect an admiralty court to possess expertise in addressing those dangers.

Our judgment is reinforced by other concerns expressed by the Supreme Court in cases defining the reach of admiralty jurisdiction. Both in Executive Jet and, more recently, in Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778 (U.S. June 23, 1982), the Court emphasized the need for uniform rules as a major factor in determining whether admiralty jurisdiction should extend to a particular dispute. In contrast to the problems of choice of forum, choice of

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in the world so far as we are informed.'"). We note, for instance, that in this case, plaintiff's decedent did some "repair" work.

law and conflicting rules of navigation foreseen in those cases, we see no similar burdens on the administration of justice or on the flow of maritime commerce that will result from a denial of admiralty jurisdiction in this case. The only inconsistency that will result is that some harbor workers -- those injured while doing the work of seamen -- may be able to recover in admiralty for their injuries while others will be left to the remedies provided by state law.

We acknowledge that Congress, in enacting and expanding the reach of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3), has provided a uniform compensation remedy for all harbor workers, regardless of whether, under the Supreme Court's test, they would have been considered to have been doing the work of seamen. We also acknowledge that the

broad reach of that statute reflects in part a solution to the confusion that resulted from trying to distinguish between harbor workers for application of state or federal compensation remedies. See Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962). It may be that Congress will make a similar determination to extend admiralty tort jurisdiction to all harbor workers, regardless of their specific activity. At this point, however, we are guided by the fact that Congress has not swept so broadly. In addition to their compensation remedy, harbor workers are entitled, under section 905(b) of the LHWCA, 33 U.S.C. § 905(b), to recover against the vessel and vessel owner for negligence. In this case, however, plaintiff asserts no claim directly against a vessel owner, nor is there any assertion that the vessel owner was negligent. Moreover, the risk encountered by plaintiff's de-

cedent is not a risk, arising from the loading or operation of a vessel, against which those on the vessel are typically protected by the vessel owner. It is, rather, the same risk as that encountered by a number of workers on a shoreside construction project.

Whatever anomalous results may follow from distinguishing between harbor workers according to the maritime nature of the hazards they encounter are at least offset, if not outweighed, by the anomalous results of treating construction workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor. The state has an interest in providing uniform treatment to these two like workers. We are, therefore, guided by the insistence of the Court in Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971), that

courts of admiralty not intrude without specific Congressional authorization into an area in which the state has an interest and that otherwise would be governed by state law. In a context similar to ours, the Court recognized the state's interest in the care of harbor workers and the availability of state laws to provide compensation for their injuries. The Court noted that:

> "Perhaps such laws provide inadequate benefits, but we are poorly positioned to conclude that they do or for that reason to give special remedies to longshoremen when other employees operating forklifts for other employers in perhaps equally hazardous circumstances are left to the mercies of state law. Claims like these are best presented in the legislative forum, not here." Id. at 215-16.

We conclude that the district court correctly held that plaintiff's claim was not cognizable in admiralty. We acknowledge that, because of the importance we assign to the activity of

the person suffering tortious injury, distinguishing between activities that are maritime and those that are not approaches medieval nicety. In this case, however, the conclusion that decedent's activity was not "traditionally maritime" is indicated by a congeries of factors -- the vessel, whether under construction or laid up for repairs, was passive and temporarily incapable of acting as such; the work being done was a major project involving specialized tools and skills, both in kind and magnitude far beyond that traditionally done by a ship's crew; and the hazards exposed could not be said to be peculiar to maritime navigation. Moreover, no recognized policy objective of avoiding onerous burdens on maritime traffic through a uniform rule is discernible. Nor does the legislative provision of coverage through the LHWCA supply an affirmative thrust for a judicial weak-

ening of Executive Jet's requirement of "traditional maritime activity." Additionally, any anomalous results from differentiating between land based harbor workers on the basis of their activity at the time of their injury are more than balanced by the asymmetries which would result from a decision applying state or admiralty law to an artisan depending on whether his workplace was supported by land or navigable water. Finally, the demands of federalism are well served by declining to intrude unnecessarily into an area in which the state has an interest and over which state law is capable of exercising control.

III. Dismissal of Strict Liability Count

A. Change in State Law

In addition to challenging the trial court's refusal to apply admiralty

law to her claims, plaintiff urges that the court erred in dismissing her strict liability count based on Maine law. At the close of all of the evidence, defendant Raybestos moved to dismiss count two of plaintiff's complaint, which alleged a cause of action in strict products liability under Maine law. The court granted the motion, citing lack of evidence that plaintiff's decedent's death could have been caused by exposure to asbestos products supplied by Raybestos to Bath Iron Works subsequent to October 3, 1973, the effective date of the Maine Strict Products Liability Statute.

The court assumed that the law of Maine was clear that a claim of strict liability could be asserted only with respect to a product sold after October 3, 1973. In its August 7, 1981 ruling, the court had granted summary judgment on the strict liability count

to all of the moving defendants who had not supplied asbestos products after October 3, 1973. The court had relied on Burke v. Hamilton Beach Division, 424 A.2d 145, 148 (Me. 1981), in which Maine's Supreme Judicial Court said that in light of clear legislative intent that none of Maine's recently enacted products liability statutes have retrospective effect "we are compelled to hold that U.C.C. section 2-318 and sections 161 and 221 of title 14 [the strict liability statute] do not apply to claims where any of the operative events, whether they are sales transactions or tort events, have occurred before the effective dates of the respective statutes."

In colloquy with counsel for Raybestos' co-defendant Unarco, concerning Unarco's request for a directed ver-

dict,[10] [Footnotes Numbered as in original] the court acknowledged that "your position is that you are entitled to a directed verdict from the strict liability count inasmuch as Maine did not recognize the strict liability until October 3, 1973. And Burke and Hurd [v. Hurd, 423 A.2d 960 (Me. 1981)] make clear that statute is not to be retroactively applied." In response to that colloquy, plaintiff's counsel agreed that "[u]nder the present state of the

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10. Unarco moved for a directed verdict on the strict liability count at the close of the plaintiff's evidence. By agreement of counsel, Raybestos reserved its motion until the close of all of the evidence since a portion of plaintiff's evidence against Raybestos was introduced after plaintiff rested to accommodate a Raybestos witness. It is clear from the record that at the time of Raybestos' motion, both the court and the parties maintained the same assumptions as to the limitation of Maine's strict liability statute to products supplied after the effective date of the statute. Plaintiff's objection to Raybestos' motion was based on what it considered to be sufficient evidence that Raybestos had supplied asbestos products to Bath Iron Works after October 3, 1973.

Maine law we don't believe that we'd have any appropriate response to [Unarco counsel's] position that he's taken on the strict liability. . . ."

After the trial in this case, the Maine Supreme Judicial Court decided Adams v. Buffalo Forge, 443 A.2d 932 (Me. 1982). The court held that strict liability applies to all injuries occurring after the effective date of the statute, regardless of the date of the sale of the allegedly defective or unreasonably dangerous product. Plaintiff urges that Adams reflects a change in law which we must apply on appeal. Defendant counters that Adams did not change the law, because, as the Supreme Judicial Court pointed out in Adams, the language in Burke regarding the strict liability statute, and on which the trial court relied, was dicta. In addition, defendant argues that plaintiff should be estopped from asserting this

the court's reliance on the Burke rule.

We are not persuaded by either of defendant's arguments. It is true that in Adams, the court insisted that it was not overruling prior Maine law regarding the reach of the strict liability statute, and that language in Burke to the contrary was merely dicta.[11] To deny plaintiff's appeal on that basis, however, seems to us an evasive reading of the rule that a change in the law between a trial and an appeal requires the court on appeal to apply the new law. The trial judge certainly and, we think, reasonably assumed that the Burke rule was the law in Maine and, on that basis, accepted it as the law of the case. We

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11. The issue in Burke was the retroactivity of the two statutes abolishing the privity requirement in negligence and breach of warrant suits. The court's discussion of 14 M.R.S.A. § 221, the strict liability statute, was in the context of a general survey of legislative intent regarding changes in Maine's products liability law.

proper rule, as expressed in Adams, applied on appeal. See Bradley v. Richmond School Board, 416 U.S. 696, 714 (1974) (quoting Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281 (1969) (absent manifest injustice to the parties, "'an appellate court must apply the law in effect at the time it renders its decision.'")).

If Adams is not seen as reflecting a change in the law, but only stating what it was, then the trial court's ruling on the motion to dismiss was simply error. Defendant relies on the doctrine of "invited error" to urge that plaintiff be barred from complaining of that error. It points to plaintiff's statement to the court that she had no response to defendant Unarco's position on the strict liability issue.

We agree that, in general, a party may not appeal from an error to which he

or by affirmatively presenting to the court the wrong law. See McPhail v. Municipality of Culebra, 598 F.2d 603, 607 (1st Cir. 1979). That rule, however, assumes that the fault for the error should lie on the appealing party. In this case, we can find little basis for holding anyone at fault -- either the parties or the court. The exercise of all diligence in researching Maine law on the issue led to the conclusion accepted by all parties and the court -- that a claim in strict liability would not lie against a manufacturer who did not supply products after the effective date of the statute. The Supreme Judicial Court has now made clear that that conclusion was error. Whether we approach this new clarity as a change in law or as simply a signalling that the court's ruling was error, we think that

plaintiff is entitled to have the correct Maine law applied on appeal.[12]

B. Harmless Error

Defendant contends that even if the trial court's dismissal of plaintiff [sic] strict liability count was error, that error was harmless because the jury's finding that the decedent's fault was equal to or greater than that of

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12. Defendant points us to a recently decided Maine case, Cuthbertson v. Clark Equipment Co., et al., No. 81-396, July 20, 1982, in which the plaintiff requested the court to remand for a new trial on the strict liability count of her complaint in light of Adams v. Buffalo Forge Co. The court declined to do so, because plaintiff had "agreed to forego its claim on strict liability" in light of Burke. Even were we bound by the reasoning of the Maine court on this issue, we would find the cases easily distinguishable. The court in Cuthbertson noted that because of plaintiff's voluntary decision to forego the strict liability count, the court had never had an opportunity to rule on the issue. In the case before us, plaintiff, although concurring in the court's reading of Burke, specifically requested that the strict liability count be left. The court then formally dismissed the count and it is from that ruling that plaintiff appeals.

from recovering under a strict liability theory. Defendant bases its argument on the assumption that Maine's comparative fault statute, 14 M.R.S.A. § 156, on which the jury was charged regarding plaintiff's negligence claim, would also be applicable to a claim based on Maine's strict liability statute.

The strict liability statute, 14 M.R.S.A. § 221, was passed in 1973. Since that time, the Maine courts have not addressed the applicability of § 156, enacted eight years earlier, to claims brought under § 221. In Wing v. Morse, 300 A.2d 491 (Me. 1973), decided just prior to the enactment of § 221, the Maine Supreme Judicial Court expressly declined to decide whether § 156 should apply to a claim based on strict liability. Id. at 500 n.10.

Plaintiff urges that since § 221 adopts the language of the Restatement

(Second) of Torts § 402A we should assume that Maine law also adopts the contributory negligence rule proposed in that section of the Restatement. Comment "n" to section 402A provides as follows:

> "n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

Under this rule, the jury would deny plaintiff recovery only if it found that her decedent voluntarily and unreasonably assumed the risk of his injury. Since the jury was charged only under Maine's comparative negligence statute, under which it could deny plaintiff recovery if it found her decedent as negligent as the defendant, there is no way to know whether the jury would also have denied recovery under the comment "n" assumption of the risk standard. Thus, plaintiff argues, we should remand for a new trial.

Defendant counters with a list of jurisdictions that have ruled that their comparative negligence statutes do apply to strict liability actions. It also urges that § 156 by its terms applies to § 221. Its reasoning is that § 156 applies to claims based on damage as a result of fault. Fault is defined as "negligence, breach of statutory duty,

or other action or omission which gives rise to a liability in tort. . . ." A violation of § 221 is both a form of "liability in tort", see Adams v. Buffalo Forge Co., supra, 443 A.2d at 940, and a "breach of statutory duty." Ergo, § 156 applies to § 221.

While there is logic to defendant's argument, we are not persuaded that the answer to this question is clear. We trust, however, that the district court on remand will, with the aid of briefing by the parties, or with the guidance of the Maine Supreme Judicial Court, should it deem certification of the question advisable, be able to determine whether Maine's comparative negligence statute should apply to a claim based on strict liability and, therefore, whether the dismissal of the strict liability count was harmless error. If not, the court should grant a retrial on both the lia-

Diffty and damages aspects of the strict liability count.

IV. Motion to Strike Comparative Negligence Defense and for a New Trial

Plaintiff's final claim of error below is that the court erred in denying her motions to strike defendant's comparative negligence defense and for a new trial on the basis of insufficient evidence that the decedent was guilty of negligence that was the proximate cause of his death or that his negligence was equal to or greater than the negligence of the defendant.

We will treat the motion to strike as a motion for a directed verdict on the issue of the decedent's comparative negligence.[13] Such a motion should be

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13. The motion to strike might also be seen as a challenge based on the rule that submission of an instruction to the jury that is unsupported by the evidence is error. See Gillentine v. McKeand, 426 F.2d 717, 723 (1st Cir. 1970). In

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granted only if, as a matter of law, no conclusion but one can be drawn. See Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1978). The burden on a moving party is thus even heavier than that on a party moving for a new trial, which motion should be granted if the trial court is convinced that the verdict is against the weight of the evidence and that a miscarriage of justice would otherwise obtain. Id.; 9 C. Wright & A. Miller, Federal Practice & Procedure: Civil, Sec. 2531 (1971).

The court denied plaintiff's motion to strike without opinion. After the jury returned its verdict, however, the court held a hearing on plaintiff's motion for a new trial and for judgment

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either case, the review is of the sufficiency of the evidence and the trial court is constrained by the rule that the evidence is insufficient to go the the jury only when, as a matter of law, no conclusion but one can be drawn.

notwithstanding the verdict. The court rehearsed the testimony and evidence presented at trial. It concluded that:

> "Based upon that review, this Court is firmly convinced that the jury was justified in reaching the determinations they did and therefore that neither a new trial nor a judgment notwithstanding the verdict is warranted. The evidence was mixed. Nevertheless, there was ample testimony at the trial, and other evidence, from which the jury properly could conclude that Blaine Austin either knew or should have known there were health hazards associated with breathing asbestos dust. See, for example, the testimony of Victor Leask, John Conley and Francis Pinette. See, also, Defendants' Exhibit No. 7, the memorandum dated May 25, 1953, from Adams to Conley.
>
> There was also ample testimony at the trial from which the jury could conclude that Blaine Austin failed to exercise due care for his own safety. See, for example, the testimony of Francis Pinette, Dennis Fraser and John Conley that Blaine Austin did not wear a respirator, though respirators were available[14]

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14. In her memorandum in support of her motion for a new trial and an appeal, plaintiff urges that there was no evi-

(footnote continued)

and Bath Iron Works had cautioned its employees to use them when working in closed spaces.

. . . .

For the above reasons, this Court cannot say that the verdict returned by the jury "was clearly against the weight of the evidence," Rios v. Empress [sic] Lineas Maritimas Argentinas, supra, 575 F.2d at 991 (fn. omitted) and at 990. The motion for a new trial is therefore denied, and since the standard which must

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dence that any respirator available to decedent at the time he was exposed to the asbestos that caused his death could have prevented him from contracting mesothelioma. The court did not specifically address that claim. A finding for her on that point however, would have required the court to agree with her as to the length of the latency period for mesothelioma -- since her argument is based on the type of respirators available in the 1950s, twenty years before the decedent's death, and as to whether mesothelioma is dose-related -- since her argument assumes that only a respirator that kept out 100% of the asbestos dust would have been effective in preventing decedent's death. We take the court's ruling that respirators were available as a recognition that testimony on both points was inconclusive and therefore, that the jury could find that use of the respirators that were available would have reduced the decedent's chances of contracting the disease.

> be met to justify a judgment notwithstanding the verdict is even higher than that which must be met to justify the granting of a new trial, it necessarily follows that the motion for a judgment notwithstanding the verdict must also be and its is [sic] therefore denied."

Our review of the court's rulings is limited. A motion for a new trial is addressed to the sound discretion of the trial court and will be reversed only for abuse of that discretion. Rios v. Empresas Lineas Maritimas Argentinas, supra, 575 F.2d at 990. See also DeVasto v. Faherty, 658 F.2d 859, 860 (1st Cir. 1981). Its ruling on the motion for judgment n.o.v. should be reversed only if viewing the evidence in the light most favorable to the nonmoving party only one conclusion can be reached. Id. Having reviewed the evidence produced at trial and the trial court's own careful consideration of that evidence, we cannot say that the

court abused its discretion in denying a motion for a new trial or that the evidence was insufficient as a matter of law to support a finding that the negligence of plaintiff's decedent was a proximate cause of his own death.

Conclusion

In conclusion, we affirm the ruling of the district court that admiralty law did not apply to plaintiff's claims. We remand the case, however, for the court to determine, either with the aid of briefing by the parties or by certifying the question to the Supreme Judicial Court of Maine, whether Maine's comparative negligence statute should be applied to a claim based on 18 M.R.S.A. § 221. If so, the court's dismissal of the strict liability count was harmless error. If not, the case should be retried under Maine law and the jury be given an opportunity to determine

whether defendant was strictly liable for its failure to warn of the dangers of asbestos and what proportion, if any, of the damages should be offset by plaintiff's decedent's own negligence.

Vacated and remanded for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE:	GENERAL DYNAMICS ASBESTOS CASES	:	C.M.L. No. 1

RULING ON PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINTS TO ADD GENERAL MARITIME TORT CLAIMS PURSUANT TO THIS COURT'S ADMIRALTY JURISDICTION

Plaintiffs in the cases under the above caption seek to recover for injuries and deaths allegedly caused by their occupational exposure to asbestos products and materials. Plaintiffs allege that these products and materials were manufactured and distributed by defendants for maritime use and that plaintiffs were exposed to asbestos while working on nuclear submarines at the Electric Boat Shipyard. The work

was done on and around vessels in navigable waters.

Defendants objects on two grounds to plaintiffs [sic] amending their complaints to assert admiralty jurisdiction. First, they contend that the proposed amendments would cause substantial prejudice to them and undue delay in the trial of these cases. Second, and emphasized as most important in their brief, they argue that the proposed amendment would be futile as it is clear that there is no admiralty jurisdiction for these cases.

The Federal Rules state that leave to amend "shall be freely given when justice so requires." Federal Rule of Civil Procedure 15(a). The Supreme Court explained the spirit of that rule in Foman v. Davis, 371 U.S. 178, 182 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to

> be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, by [sic] "freely given."

Defendants in these actions have failed to demonstrate that the amendment will cause undue prejudice or serious delay in the trial of these cases. The fact that the amendment may result in some prejudice to the defendants, including the need for additional discovery, is not necessarily fatal to the assertion of plaintiffs' admiralty claims. The question is whether there is sufficient prejudice to deny plaintiffs an opportunity to try their claims. In similar asbestos-related litigation, Judge Sifton recently

granted plaintiffs leave to amend to assert admiralty jurisdiction despite claims of prejudice on the part of the defendants. Jacobowitz v. Johns-Manville Sales Corp., 79 C 865 (E.D.N.Y. Sept. 28, 1982). The court noted that the "prejudice sought to be avoided is that caused by an amendment that renders it impossible for a defendant to property prepare its case on the merits. . . ." Slip op. at 7. In both these case the defendants were aware of the central issue of the case, their liability to plaintiffs for allegedly asbestos-related injuries, from the time the original complaints were filed. Id. at 8.

Defendants' claims of substantial prejudice and delay appear to rest on the need for additional discovery and the subsequent delay as the discovery is

conducted.[1] The additional discovery will be related to contribution or other comparative responsibility between joint tortfeasors, permitted under admiralty law but not recognized under Connecticut law. The burden of additional discovery, however, is not a sufficient basis to deny a motion to amend. See Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 386 (2d Cir. 1968). Furthermore, little, if any, delay should be caused by plaintiffs' amendment. This court has previously held that the trial of plaintiffs' cases

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1. Although they rhetorically inquire as to why plaintiffs' counsel did not assert these theories of jurisdiction years ago, defendants make no allegations of bad faith on the part of the plaintiffs. "Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981). Moreover, failure to assert admiralty claims prior to the Fourth Circuit's decision in White v. Johns-Manville, 662 F.2d 234 (4th Cir. 1981), cert. denied, 102 S. Ct. 1037 (1982), is hardly surprising.

against defendants are to be severed from the trial of any cross-claims. In Re General Dynamics Asbestos Cases, CML No. 1 (D. Conn., Dec. 28, 1981). Thus, discovery relevant to cross-claims for contribution may proceed after the upcoming trials.

Defendants also urge that the court dismiss the plaintiffs' amendments as futile. The standard for futility has been regarded by the courts as approaching frivolity or clearly apparent legal insufficiency. See Howey v. United States, 481 F.2d 1187 (9th Cir. 1973). "Unless a proposed amendment is clearly frivolous or legally insufficient on its face, the substantive merits of a claim or defense should not be considered on a motion to amend." Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228, 231 (S.D.N.Y. 1981). In light of the Fourth Circuit's decision in White v. Johns-Manville, 662

F.2d 234 (4th Cir. 1981), cert. denied, 102 S. Ct. 1037 (1982), the assertion of admiralty jurisdiction in these cases is obviously not frivolous.[2] The issue of whether the plaintiffs have in fact stated a proper cause of action is not now before the court. The extensive arguments made by defendants concerning the lack of admiralty jurisdiction in these cases may be more appropriately made in support of a motion to dismiss.

Accordingly, plaintiffs' motions to amend their complaints are granted.

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2. In addition to Judge Sifton's decision in Jacobowitz, assertions of admiralty jurisdiction over the claims of shipyard workers have been allowed in a number of other districts. See, e.g., Costa v. Johns Manville Sales Corp., 81-0783 P (D.R.I., July 16, 1982); In Re: Key Highway, Fairfield and Sparrows Point Shipyard -- Asbestos Cases, B.M.L. No. I ALL CASES (D. Md., Oct. 14, 1982). Dicta in the recent decision of the Second Circuit in Keene Corporation v. United States, 82-6023 (2d Cir., Feb. 10, 1983), dismissing Keene's claim against the United States for indemnity or contribution on 14,000 suits against Keene by asbestos workers, does not operate to make this claim frivolous.

Plaintiffs are directed to file an amended complaint within 20 days from the date of filing of this decision.

SO ORDERED.

Dated at Hartford, Connecticut, this 25th day of March, 1983.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
Senior United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NANCY JACOBOWITZ, Administratrix of the Estate of Morris Jacobowitz, : 79 C 865

Plaintiff, :

-against- :

JOHNS-MANVILLE SALES CORPORATION, etc., et alia, :

Defendants. :

- - - - - - - - - - - - - - - - - x MEMORANDUM DECISION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SOPHIE KAPURA, Administratrix of the Estate of John Kapura, Deceased, : 79 C 3200

Plaintiff, :

-against- :

JOHNS-MANVILLE SALES CORPORATION, etc., et alia, :

Defendants. :

- - - - - - - - - - - - - - - - - x

APPEARANCES:

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SIFTON, District Judge.

Both of the above captioned actions seek to recover for injuries and deaths alleged to have been caused by exposure to asbestos. Sophie Kapura, Administratrix of the Estate of John Kapura, commenced her action on April 6, 1979. John Kapura is alleged to have been exposed to asbestos while employed by the Navy as a shipfitter at the New York Naval Shipyard, Brooklyn, New York, from 1943 to 1945. He is said to have been diagnosed as suffering from mesothelioma on July 29, 1977. John Kapura died on January 25, 1978. Nancy Jacobowitz, Administratrix of the Estate of Morris Jacobowitz, commenced her action on December 19, 1979. Morris Jacobowitz is alleged to have been exposed to asbestos while employed by the Navy as a ship repair machinist at the New York Naval shipyard from 1941 to 1945. He is said

to have been diagnosed as having lung cancer in May of 1977. Morris Jacobowitz died on March 19, 1978. Both complaints are based upon theories of negligence, gross recklessness, strict liability, intentional misconduct, and breach of implied and express warranties.

Defendants in both cases have moved to dismiss these actions on the ground that plaintiffs' actions are barred by the applicable New York statute of limitations. Plaintiffs have cross-moved to amend their complaints to assert admiralty jurisdiction over these actions.[1]

The Motions to Dismiss

Both of these actions were stayed pending a decision by the New York Court of Appeals with respect to the proper accrual rule to be applied under the applicable New York statute of limita-

tions in asbestos actions. In October 1981, the New York Court of Appeals resolved this issue in defendants' favor. Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (1981), cert. denied, 102 S. Ct. 2226 (1982). In Steinhardt, plaintiffs brought actions similar to both cases at bar alleging injuries caused by inhalation of asbestos particles. As in these cases, each of the Steinhardt plaintiffs had commenced his or her action well over four years after his or her decedent's last employment related exposure to asbestos. The Steinhardt court held that the statute of limitations on these actions accrued at the time of last exposure to the asbestos rather than at the time the injuries were or could have been discovered.

After Steinhardt was decided, defendants in the cases at bar filed motions to dismiss, asserting that the causes of action alleged are barred by the applicable New York statutes of limitations, since plaintiffs' decedents were last exposed to asbestos in the 1940's. Plaintiffs concede that their state law claims are barred by the statute of limitations pursuant to Steinhardt. Accordingly, defendants' motions to dismiss are granted with respect to the causes of action set forth in plaintiffs' original complaints.

The Motions to Amend

Plaintiffs, however, also seek to amend their complaints to assert new causes of action within this Court's admiralty jurisdiction. Plaintiffs contend that the admiralty actions would

not be governed by the New York statute of limitations with its time of exposure accrual rule, but rather by the doctrine of laches. Furthermore, plaintiffs state that their admiralty actions are timely commenced under the doctrine of laches.

Defendants object on several grounds to plaintiffs amending their complaints to assert admiralty jurisdiction. First, they argue they would be unfairly prejudiced by such amendments. Second, they argue that plaintiffs are barred by an agreement not to assert any new causes of action. Third, defendants contend that these actions do not properly fall within this Court's admiralty jurisdiction. And finally, defendants argue that, even if these actions are properly admiralty cases, they were not timely commenced. For the reasons stated below, I find that the

parties did not enter into an agreement which would bar plaintiffs from amending their complaints to assert admiralty jurisdiction and that plaintiffs must be granted leave to amend their complaints pursuant to Federal Rules of Civil Procedure 15 without prejudice to defendants' seeking dismissal of the amended complaints for lack of jurisdiction or laches.

Leave to amend shall be "freely given when justice so requires." Federal Rules of Civil Procedure 15(a). Here, plaintiffs seek to amend the complaints to assert causes of action pursuant to 28 U.S.C. §1331(1), 46 U.S.C. §§740 et seq., 33 U.S.C. §§901 et seq., and the general admiralty and maritime laws of the United States. "Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous or made as a dila-

tory maneuver in bad faith, it is an abuse of discretion to deny such a motion." Howey v. United States, 481 F.2d 1187, 1190-91 (9th Cir. 1973); see Forman v. Davis, 371 U.S. 178, 182 (1962); Middle Atlantic Utilities Co. v. S.M.W. Development Case, 392 F.2d 380 (2d Cir. 1968). Defendants have failed to meet their burden of establishing that: (1) the amendments will prejudice their cases, (2) the motions are made in bad faith or in a dilatory manner, or (3) the admiralty causes of action are frivolous. Such being the case, plaintiffs "ought to be afforded an opportunity to test [their] claim[s] on the merits." Forman, supra at 182.

Defendants' contention that they will be prejudiced if plaintiffs are granted leave to amend their complaints to assert admiralty jurisdiction must be rejected. The possibility that a party

may be subject to additional liability as a result of an amended complaint is not the kind of prejudice which precludes amendment. Rather, the prejudice sought to be avoided is that caused by an amendment that renders it impossible for a defendant to properly prepare its case on the merits, such as an amendment on the eve of trial which takes a defendant by surprise and for which a defendant has insufficient time to prepare and defend.

Defendants have not shown here the kind of prejudice that would warrant a denial of plaintiffs' motions to amend. These actions are not on the eve of trial. In fact, discovery has not yet been commenced. Defendants' preparation for trial will in no way be prejudiced. The filings of the original complaints put defendants on notice as to the central issue of these actions -- whether

defendants should be held liable to plaintiffs for injuries allegedly caused by asbestos exposure. This central issue will not be changed by amendment of the complaint. Even if defendants were unaware of the possibility that admiralty jurisdiction would be invoked -- a questionable assumption, as all defendants were involved in White v. Johns-Manville, 662 F.2d 234 (4th Cir. 1981), cert. denied, 102 S. Ct. 1037 (1982) -- defendants have been aware of the central issue involved in these actions since the time of filing of the original complaints.

Defendants argue that the two-year interval between the time these actions were filed and plaintiffs' motions to amend their complaints to assert admiralty jurisdiction will hinder defendants' ability to properly defend the admiralty claims. These actions, how-

ever, involve injuries alleged to have been caused by asbestos exposure in the 1940's. Defendants have failed to explain why two additional years will substantially prejudice their ability to defend these actions. The difficulties for both plaintiffs and defendants in preparing for trials involving facts that occurred several years ago may be significant. However, the difficulty is not markedly increased by an additional two years. "Mere delay ... absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981).

Defendants also assert that it would be unfair to allow plaintiffs to amend their complaints because if defendants had not agreed to a stay, the actions would now be dismissed as barred

by the statute of limitations, and plaintiffs' admiralty claims would be barred by res judicata. This argument, however, assumes that this Court would not have stayed discovery regardless of any agreement between the parties. A federal court may stay an action involving an important question of state law where it is expected that the state's highest court will soon be resolving the issue. In addition, this argument assume [sic] that plaintiffs would not have cross-moved to assert admiralty jurisdiction had motions to dismiss been made in 1979 or 1980. Although the Fourth Circuit had not yet rendered its decision in White, supra, plaintiffs, faced with motions to dismiss the state law diversity claims, might have concluded, as the plaintiff in White concluded, that admiralty jurisdiction should be asserted. In

short, defendants' assertion that, but for their agreement to stay the actions, plaintiffs' admiralty claims would now be barred by res judicata is speculative and does not warrant a conclusion that defendants will be unfairly prejudiced by the amendments.

Defendants have also failed to show that plaintiffs' motions to amend have been made in bad faith or that plaintiffs have been dilatory in making the motions. Plaintiffs made their motions to amend soon after the Fourth Circuit's decision in White, supra. The White decision appears to be the first federal decision holding that admiralty jurisdiction is properly invoked where shipyard workers are alleged to have been injured due to exposure to asbestos. Failure to assert this claim prior to the White decision can hardly be characterized as dilatory.

Nor have defendants demonstrated that the assertion of admiralty jurisdiction in these cases is frivolous. Indeed, in light of the White decision, such a claim cannot be made. Defendants seek to distinguish these cases from White, and they contend that White was wrongly decided. However, the issue is not whether plaintiffs have, in fact, stated a proper cause of action or whether plaintiffs will be able to prove the cause of action, but whether the proposed cause of action is frivolous. Plaintiffs' contention that timeliness of bringing an admiralty action is governed by the doctrine of laches and that plaintiffs' actions would not be barred by the doctrine of laches has substantial support in case law. See Public Administrator of the County of New York v. Angela Compania Naviera, S.A., 592 F.2d 58, 61 (2d Cir.), cert.

denied, 443 U.S. 928 (1979). The arguments made by defendants in opposition to plaintiffs' motions to amend may be appropratelу [sic] made in motions to dismiss or for summary judgment. See Madison Fund Inc. v. Denison Mines Ltd., 90 F.R.D. 89, 91 (S.D.N.Y. 1981).

Defendants also contend that amendment of the complaints to assert admiralty jurisdiction is barred by a prior agreement of the parties to the effect that the New York Court of Appeals' decision would be wholly dispositive of these actions and that, should plaintiffs lose on the New York statute of limitations issue, their actions might be dismissed with prejudice. Plaintiffs deny that they entered into any such agreement.

Clearly, a valid stipulation may be entered into between counsel whereby

judgment in one suit will have a binding effect on the outcome of another suit that involves the same issues or interests. See, e.g., Sampson v. Sony Corp., 434 F.2d 315 (2d Cir. 1970); 83 C.J.S. Stipulations §10(f)(1). However, nothing in the record to which defendants have directed the Court's attention on this issue establishes even prima facie that plaintiffs agreed that a decision by the New York State Court of Appeals on the state law statute of limitations question barring plaintiffs' diversity actions would also bar plaintiffs from asserting any alternative causes of action that might not be governed by the New York statute of limitations.

In the case at bar, unlike Sampson, supra, there is no written stipulation which states that plaintiffs would be barred from pursuing any alternative

causes of action if the New York Court of Appeals decided that plaintiffs' diversity cause of action was barred by the statute of limitations. Nor can any express or implicit agreement to that effect be inferred from the oral colloquy to which the defendants have referred the Court.

At a status conference in the Jacobowitz case on March 18, 1980, the undersigned in fact asked defendants to submit a written stipulation concerning the agreement, if any, that the parties had reached with respect to the stay. At that time, the undersigned was told by John Burke, counsel for Johns-Manville, that "[t]here had been no stipulation, but it certainly wouldn't be a problem to draft and file one." (Tr. 3/18/80 at 7). No such stipulation was, however, filed with this Court. Nor does Mr. Burke's characterization of

the agreement that had been reached establish an agreement to accord the state court's disposition of the Steinhardt case full res judicata effect in this action. When asked whether they were prepared to the [sic] bound by the state court's determination, Mr. Burke stated:

> "There has been [an] agreement of sort[s] reached that the plaintiffs, as well as the defendants, would be bound by the state court's determination at least vis-a-vis the statute of limitations issue." Id. at 5-6.

The other proceedings in these and related actions totally fail to show the agreement alleged by defendants, either expressed or implied.

On September 10, 1979, Andrew S. Lipton, an attorney associated with the office of Norman J. Landau, plaintiffs' attorney in these actions, wrote Judges Mishler and Weinstein concerning a stay

of discovery in Hall v. Johns-Manville, 79 Civ. 268; Cullen v. Johns-Manville, 78 Civ. 2237; Rosenthal v. Johns-Manville, 78 Civ. 2047; Biletsky v. Johns-Manville, 79 Civ. 1379; and the Jacobowitz action (Burke Affidavit of 3/15/82 at Exhibit A). The Kapura action, which was filed in December 1979, had not yet been commenced. The letter stated as follows:

> "The parties in the above captioned matters [Hall and Cullen] met today with Magistrate Caden to discuss questions of pre-trial discovery. It was the consensus of all present that we request a stay of all discovery pending a final state court decision on the satute [sic] of limitations issue."
>
> "In all of these cases there is a common issue: When does the cause of action for asbestos-related disease accrue under New York law? The Supreme Court, First Department, has recently ruled on this issue in seven cases, where this office represents the plaintiffs, dismissing the complaints. (See decision of Hughes, J. enclosed herewith.)

> Upon entry of the orders plaintiffs intend to appeal. (An appeal to the Appellate Division, Fourth Department, is presently being perfected in a similar case.)
>
> "In view of the fact that a resolution of this issue in defendants' favor could dispose of all these cases, we recommend that all discovery be stayed as to prevent the numerous parties from spending time and money where there is a legal question as to the viability of plaintiffs' actions."

The only agreement expressed in this letter is to stay the actions, then based on diversity jurisdiction, pending a final state court determination of the statute of limitations issue. It is impossible to infer from this agreement an agreement not to assert any other causes of action or theories of jurisdiction that might not be governed by the New York statute of limitations.

In addition, Mr. Burke wrote Judges Mishler and Weinstein on September 14,

1979, Burke Affidavit at Exhibit B, as follows:

> "A conference was held in Hall v. Johns-Manville, et al., before Magistrate Caden on September 10, 1979, at which time the parties in said action agreed to stay all discovery in the asbestos litigation pending a final state court decision on the statute of limitations issue, subject to the approval of the Court."

On September 18, 1979, counsel for defendant Celotex Corporation also wrote Judges Mishler and Weinstein in response to Mr. Landau's September 10, 1979 letter. Burke Affidavit at Exhibit B. Celotex's attorneys advised the Court that "[we] concur that discovery proceedings in these cases should be stayed pending determination of the statute of limitations issue by the Court of Appeals of the State of New York."

Neither of these letters, written by defendants to Judges Mishler and

Weinstein, indicates that plaintiffs had agreed not to pursue any other causes of action should the statute of limitations ruling bar plaintiffs' diversity claims. Again, there is insufficient basis upon which to imply an agreement by plaintiffs that the New York Court of Appeals' ruling would dispose of the actions in their entirety, even if new causes of action, not governed by the New York statute of limitations, were asserted.

By letter dated January 8, 1980, Andrew S. Lipton, counsel for plaintiffs, wrote Judge Mishler to inform him that plaintiffs desired Judge Mishler to assign all five cases to himself so that plaintiffs could bring on a single motion to remove the stay, allege and establish federal question jurisdiction, and strike defendants' statute of limitations affirmative defenses. Plain-

tiffs sought to amend their complaint to assert a cause of action based upon 16 U.S.C. §457, which provides for actions for death or personal injury within a national park or any other place subject to the exclusive jurisdiction of the United States. Plaintiffs asserted that the injuries were covered by the statute, as the injuries occurred at the Brooklyn Naval Yard, and that an action brought pursuant to 16 U.S.C. §457 would be governed by a federal statute of limitations employing a date of discovery accrual rule rather than the New York date of exposure rule.

On January 18, 1980, the parties appeared before Judge Mishler with respect to plaintiffs' application. Burke Affidavit at Exhibit E. The transcript of this argument shows that there was at that time, as now, sharp disagreement as to whether plaintiffs had agreed to

forego pursuing any federal cause of action. Judge Mishler directed the parties to brief the issue. Plaintiffs argued that, when the actions were originally stayed, all the parties understood that the actions were controlled by state law, but that plaintiffs had now discovered that they had a cause of action that was governed by a time of discovery accrual rule. Plaintiffs asserted that the stay should be lifted, as the state law statute of limitations was no longer controlling. In the course of argument on this matter, Franklin Meyer, counsel for Raybestos-Manhattan, Inc., stated:

> "We're not asking [plaintiffs] to give up; and in fact, it is not going parallel now because these actions are stayed and there is nothing to be lost because, in the event that the defendants' positions are sustained on appeal before the state court, then Mr. Landau [plaintiffs' counsel] would be free to serve an amended pleading in order to preserve

these actions. He's not losing anything. He can assert these causes later." (Tr. at 15)

Later in the argument, Mr. Meyere abandoned this position and asserted that plaintiffs were barred from bringing any federal causes of action, regardless of how the state law statute of limitations issue was decided. This shift in position indicates that there was no clear agreement that plaintiffs could not pursue alternative causes of action. Judge Mishler asked defendants whether there was any correspondence indicating that plaintiffs would be barred by whatever happened in the state court. The only evidence of such an agreement offered by defendants was plaintiffs' September 10, 1980 letter to Judges Mishler and Weinstein. As discussed above, however, this letter does

not evidence an agreement by plaintiffs to forego all possible causes of action.

Accordingly, (1) plaintiffs' motions to amend their complaints are granted, and the plaintiffs are directed to file an amended complaint within twenty days of the date of filing of this decision hereof,[2] and (2) defendants' motions to dismiss these actions are granted with respect to plaintiffs' state law causes of action based upon diversity of jurisdiction.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York
September 28, 1982

/s/ Charles P. Sifton
United States District Judge

FOOTNOTES

1. Because it appears that Johns-Manville Sales Corporation has filed for protection under the Bankruptcy Act and that a stay has issued with regard to all proceedings against it, what follows relates solely to the other defendants in the case and does not effect the motions filed on behalf of Johns-Manville Sales Corporation or against it.

2. Plaintiffs' proposed amended complaint also has new allegations of fraud, misrepresentation, and conspiracy, as well as new factual allegations concerning where plaintiffs' decedents were exposed to the asbestos. Plaintiffs must also be permitted to amend their complaint to assert these new legal and factual allegations, as defendants have now shown that these new allegations are frivolous or brought in bad faith.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DONALD O. FRANKLIN, Plaintiff, v. JOHNS-MANVILLE CORP., et.al, Defendants.	)	NO. C81-533M ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS MATTER came on for consideration before the Court upon plaintiff's motion to amend complaint to state the cause of action within federal court admiralty jurisdiction. Plaintiff Franklin is presently allegedly suffering from lung cancer caused by his exposure to asbestos during his career as a sheetmetal worker. Plaintiff asserts that a maritime nexus exists by virtue of Mr. Franklin's employment having been 95% aboard ships in navigable United States waters and 5% of the time adjacent to navigable waters.

Defendants Pittsburgh Corning and 48 Insulation do not oppose amendment given the liberal provisions of Fed. R. Civ. P. 15, but do not agree that maritime jurisdiction extends to this case and intend to move to strike such allegations later. Standard Asbestos Manufacturing and Insulating Company (Standard Asbestos) opposes the motion for leave to amend the complaint, but does not ask the Court to rule on whether the facts of this case support an allegation of admiralty jurisdiction, stating that that should properly be left for a defense motion. Defendants Nicolet, Inc., Owens-Illinois, Inc., Eagle-Picher Industries, and Fibreboard Corporation join Standard Asbestos' objection to the plaintiff's motion to amend his complaint to include claims in admiralty.

For the reasons stated below, the Court denies plaintiff's motion to amend his complaint.

Standard Asbestos urges the Court to deny plaintiff's motion on the basis of undue delay because the plaintiff knew all the facts necessary for the basis upon which he is making his motion when the original complaint was filed May 7, 1981. Plaintiff's attorney replies by way of supplemental affidavit and states there has been no unreasonable delay, that shipyard work alone is normally an insufficient basis for a claim in admiralty and that it was only within the last two months that he became aware of plaintiff's work upon the navigable waters of the United States. The Court finds insufficient basis to place this claim within the Court's admiralty jurisdiction. To allow amendment now only to address the issue again

when defendants see fit to raise it would be a waste of time. The Court will therefore sua sponte address the issue of whether or not there is a claim in admiralty.

The issue before the Court is whether a plaintiff who asserts that the cause of his lung cancer is the asbestos he was exposed to over the course of his career as a sheetmetal worker employed 95% of the time of ships and navigable United States waters, has stated a claim within the Court's admiralty jurisdiction.

It is helpful to consider the purpose of admiralty jurisdiction when reviewing the relevant cases to decide the issue before the Court. A purpose of admiralty jurisdiction has been stated to be the uniform administration of laws governing the unique customs and traditions of maritime commerce. Recent

Developments, 27 Vand. L. Rev. 343 (1974). Maritime commerce is commerce in the context of navigation. See, e.g., Peoples Ferry Co. v. Beers, 61 U.S. 393 (1857). Uniform laws must apply to this activity because the states have no jurisdiction upon the high seas, and it would be inimical to the needs of maritime commerce to abide numerous different state rules of trade.

Admiralty jurisdiction under 28 U.S.C. § 1333 in a tort context requires a maritime nexus. The law has developed from a strict locality test of whether the breach occurred in navigable waters. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), required the tortious occurrence to be related to maritime commerce. Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), refined the Executive Jet requirement by suggesting four

factors to consider in determining the maritime element. The Ninth Circuit adopted this approach in T. J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975). The four factors to be considered are as follows: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and nature of the injury suffered, and (4) traditional concepts of the role of admiralty law. Each of these factors will be addressed separately.

(1) Functions and Roles of the Parties

Defendants, as manufacturers, suppliers or otherwise, are alleged to have placed in the stream of commerce, asbestos products, including asbestos products designed and marketed for maritime use and installation on ships,

which caused damage to the plaintiff from exposure or handling of the asbestos products during the course of his employment as a sheetmetal worker aboard ships. The plaintiff claims that defendants are liable for alleged negligent conduct under the provisions of Restatement (Second) of Torts § 402A (1965).

The only marine element in this case are the ships. The plaintiff is a sheetmetal worker who has performed his duties in shipyards. The activity is thus local in nature. The plaintiff's role did not involve interstate or foreign shipping. The defendants were not involved in the manufacturing and/or marketing of asbestos products. The parties' roles only tangentially involved the shipping industry.

The rationale of the holding in White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 102

S.Ct. 1037 (1982), cited by the plaintiff, is not persuasive, although the facts are similar. That case involved a claim that plaintiff's exposure to asbestos products resulted in personal injury, and the action was held cognizable in admiralty. The Court referred to the two-part test of Executive Jet and found that a maritime locality was present and that a maritime nexus to traditional maritime activity was also present. The Court carefully restricted its holding saying:

> [W]e today only hold that under the circumstances of these cases, when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products, the Executive Jet criteria had been met and admiralty jurisdiction should be exercised.

662 F.2d at 240. Thus the Court pointed out this would not result in admiralty jurisdiction over the production of any item that found its way onto a ship, and

that design, advertising, and marketing directed toward maritime use would be the crucial factor. The Court also found the installation of asbestos products had a direct effect on marine navigation: without the employees' fabrication and replacement of asbestos insulation, vessels would have been unable to perform their maritime role as carriers of people and cargo.

This analysis is unpersuasive because maritime commerce means the shipment of goods or the carrying of people aboard vessels navigating in interstate or foreign commerce. It is this maritime commerce that requires the uniformity provided by the admiralty laws, not design, advertising and marketing directed at the shipping industry, and not fabrication and installation of such products by land-based employees. The situs of the activity is purely local,

and the functions and roles of the parties are not traditionally maritime in nature.

(2) The Types of Vehicles and Instrumentalities Involved.

Involved in this case are ships onto which the asbestos products were installed by the plaintiff. Merely because a ship is involved does not mean that maritime commerce is involved. The ships were in dry dock or floating at the shipyards, they were not engaged in any commerce, and the plaintiff's activity upon the ships did not transform that status.

The asbestos insulation is not maritime in nature; it was merely designed or adapted for that use and promoted as such. Such promotion and adaptation does not result in maritime commerce.

(3) The Causation and Nature of the Injury Suffered.

The plaintiff alleges that his lung cancer is attributable to his exposure to asbestos while working in shipyards along the west coast of the United States intermittently from 1944 through 1980. (Knopp Affidavit.) This kind of injury could have been alleged by anyone who worked with asbestos. Sheetmetal workers doing installations of asbestos other than on board a ship could bring a cause of action similar to the case at bar. There is nothing about the injury that would necessitate a maritime causation.

(4) Traditional Concepts of the Role of Admiralty Law.

No admiralty concept or expertise is required to resolve this case. Only traditional tort law concepts need be

applied. Uniformity is not an overriding concern since there is no interstate or foreign commerce involved. The activity and commerce involved precedes the actual shipping which the admiralty laws were designed to protect and foster.

Two Ninth Circuit cases involving product liability law in admiralty are distinguishable. Jones v. Bender Welding and Machine Works, Inc., 581 F.2d. 1331 (9th Cir. 1978) involved damage to a fishing vessel resulting from alleged negligence of a marine diesel engine manufacturer in designing an oil cooler supply line. The line malfunctioned on the high seas and in coastal waters and damaged the vessel. In Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977), the Enterprise, having undergone a major rebuilding, was 13 hours out on

its maiden voyage, abeam of Nanaimo, British Columbia in the Strait of Georgia, when a fuel oil fire broke out in her engine room. The vessel sank and the crew escaped in life rafts. A negligence/product liability suit was brought in admiralty for this loss.

These cases are distinguishable because plaintiffs were trying to recover for damage to or loss of the actual vessels which were engaged in maritime commerce at the time of the loss. Maritime commerce was directly affected in these cases. In contrast, Franklin's injuries are personal and did not occur during the course of maritime commerce.

When all these factors are considered together with the concerns for uniformity in he administration of laws governing maritime commerce and navigation, no significant relationship to traditional maritime activity is reveal-

ed. The activity as a whole is local in nature and no special admiralty principles are required to resolve this personal injury action.

There being no maritime nexus existing as required to render the tort allegations cognizable in admiralty,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff's motion for leave to amend his pleadings to allege a cause of action arising under admiralty jurisdiction is DENIED.

DATED this 10th day of June, 1982.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DONALD O. FRANKLIN, Plaintiff, v. JOHNS-MANVILLE CORPORATION, et al., Defendant.	NO. C81-533M ORDER, UPON RECONSIDERATION, AFFIRMING JUNE 10, 1982 ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS MATTER is before the Court upon Plaintiff's Motion for Reconsideration of the Court's Order Denying Motion to Amend Complaint to State a Claim in Admiralty. Upon reconsideration of its June 10, 1982 Order and study of counsels' additional memoranda on the subject, the Court affirms its decision for the following reasons.

In order to rationally focus the boundaries for torts in admiralty, it is necessary to look to the source of the jurisdiction and the considerations underlying its creation.

The Constitution contains the basic provision: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . . ." U.S. Const., Art. III, § 2. Congress provided some details in 28 U.S.C. § 1333: "the district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled"; and in 46 U.S.C. § 740: "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The task of this court is to interpret "admiralty and maritime Jurisdiction" in the context of this personal injury suit.

The jurisdiction should serve the purpose for which it was created. A plaintiff may enjoy some advantage admiralty confers if some attenuated connection with navigable water can result in admiralty jurisdiction, but this is no basis for a principled decision. Uniform decisionmaking, a long-felt need of maritime commerce, is not served by such efforts of plaintiffs seeking to choose the law.

In tracing the contours of the boundaries between admiralty and nonadmiralty cases, Charles Black found in 1950 that "[t]he coverage of the term 'cases of admiralty and maritime jurisdiction' has been delimited, not on the basis of clear practical relation of the included or excluded cases to the business of navigation and transport, but on the basis of considerations of historical accident, 'location' of concepts, metaphysical rather than

practical conclusions as to what 'concerns' what, etc." Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 266 (1950).

Considering tht maritime matters were singled out for special intention in the Constitution, there had to have been some intention behind this passage that would render a rational delimitation. Though aids in determining this intent are "sparser than usual," id. at 262, Black suggests "[t]he whole story seems to be told in Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 Corn. L. Q. 460 (1925). Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3-28 (1948), suggests that the adoption of the admiralty clause was prompted by concern for the international relations involved in shipping." Id., n. 9. Another author states:

> Perhaps [the] most easily explained [grants of jurisdic-

> tion in article III, section 2, of the Constitution] are the grants of admiralty jurisdiction and of jurisdiction over cases between two or more states. Maritime commerce was at that time the principal business activity of the states. The need for uniformity in such cases was deeply felt, and it was recognized also that admiralty cases normally arise outside the borders of any state, and that they may involve relations with other nations. For all these reasons, in Hamilton's phrase, even "the most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes."

C. Wright, Handbook of the Law of Federal Courts 1, at 2 (3d ed. 1976) (quoting The Federalist No. 80 at 502. (A. Hamilton) (Wright ed. 1961). Today the interstate and foreign commerce elements of maritime commerce still give rise to the need for uniformity. As stated in the Court's June 10, 1982 Order, "[u]niform laws must apply to this activity because the states have no jurisdiction upon the high seas, and it

would be inimical to the needs of maritime commerce to abide numerous different state rules of trade." No such need for uniformity attaches to tort law, however, unless connected with the business of shipping as described below, because people do not plan their torts.

1 Benedict, Admiralty 7-4, 7-6 (6th ed. 1981), defines "admiralty" as the Court's power to administer civil and criminal "law of the sea" exercised only over cases of "maritime" character, and defines "maritime" as relating to the "sea," meaning navigable waters. The definition continues, "In absence of federal legislation, it's a truncated view to say jurisdiction extends only to cases involving maritime navigation and commerce." These definitions help not [sic] all with the problem of principled delimitation.

Courts routinely interpret statutes and constitutional grants of power. Some interpretation of the constitutional and statutory provisions applicable here must be engaged in -- given such terse language and so broad a grant -- before any case may be included or excluded from admiralty.

Here we realize that the shipping industry has major concerns that are best served by a federal forum, but that these concerns can easily reach very far into the nonmaritime. G. Gilmore and C. Black, The Law of Admiralty, 1-10, at 29, (2d ed. 1975). Black concludes that the field in which the allocation of maritime jurisdiction may operate includes:

> (1) In contract, all those cases involving the enforcement, policing, or adjustment of business arrangmements as a practical matter primarily concerned with sea, lake, and river transport. (2) In tort, all those cases seeking relief for tortious conduct with respect to the subject-

> matter of (1), or for injuries by or to vessels or other maritime objects, or injuries to persons taking place in connection with the conduct of the business of shipping. (3) Miscellaneous cases referable arbitrarily to one of the above categories.

Black at 274.

Although Black's suggestion for limiting this field is a radical one requiring Congressional action, it will nevertheless be helpful for our purposes. Black designates those cases which it seems "wise and proper" for Congress to allocate specifically to the federal district court sitting in admiralty:

> The federal district court sitting in admiralty should have exclusive jurisdiction of all those cases involving contractual, commercial and property adjustment, necessity for which grows out of the conduct of the maritime industry. The state courts, with removal impossible either on diversity or other grounds, should have exclusive jurisdiction of all cases of personal injury, to seamen or others.

Black at 276. Given the present inability to place this diversity case in the state court system, it is nevertheless instructive to consider the intention behind this passage -- that federal jurisdiction is intended to cover only those cases "arising primarily out of the conduct of the business of shipping." The rationale behind giving the personal injury cases to the state courts is helpful in considering whether the tort in the case at bar should be cognizable in admiralty. Black states:

> In these cases, the expertise of the separate court of admiralty is not nearly so much needed as in the cases involving complicated business and property adjustment. The admiralty procedure and mode of trial is quite unsuitable to them. Although the jury is often a fifth wheel in a complicated commercial case, in personal injury cases, it is a vital part of the picture, since the estimation of the intangible but real elements of damage entering into such cases is very much a matter of lay feeling. The common law courts are thoroughly used to such cases, and handling them

> may be looked on as part of the expertise of the common law bench and bar, as it could not be expected to be of the admiralty.

Id. at 278.

Black admits that this attempt at line drawing results only in "a fairly discernable line" requiring further definition, but says "[t]he point is that, in drawing the line on the basis of practical relations with an actually operative industrial complex, we are at least trying to draw it right. . . ." [Emphasis added.] An admiralty Court's jurisdiction ought not to be increased to include cases, such as that at bar, that are primarily nonmaritime. And this should be true whether personal injury cases are excluded according to Black's suggestion or not.

The alleged tortious conduct in this case certainly does not relate to the tort cases which Black allocates to maritime jurisdiction: they do not arise

from contracts concerning shipping nor did the injuries take place in connection with the conduct of shipping. This case involves plaintiff's exposure to asbestos during the installation of asbestos insulation on ships idle in shipyards. Perhaps the best reason for having admiralty jurisdiction at all -- the "aptness for providing a special industry court for the maritime industry" -- G. Gilmore & C. Black at 30; see also, Black at 260, 276 et seq., provides practical guidance for narrowing the scope of recognition of torts in admiralty. The Court's June 10, 1982 order generally details the lack of such aptness in the case at bar.

In a 1972 decision, the Supreme Court excluded from admiralty jurisdiction all those torts which chanced to occur on navigable waters but had no other maritime relationship. Executive Jet Aviation, Inc. v. City of Cleveland,

409 U.S. 249 (1972). When the Supreme Court unanimously affirmed the lower court's denial of admiralty jurisdiction in that suit arising from an airplane crash into Lake Erie after takeoff from a Cleveland, Ohio airport, it was hailed as part of a "more rational directive" that could "frame a new rationality in the law of admiralty jurisdiction." G. Gilmore & C. Black, supra at 31.

Executive Jet highlighted a limiting factor when it emphasized that admiralty jurisdiction is a question of federalism:

> The power reserved to the states, under the Constitution, to provide the determination of controversies in their courts may be restricted only by the action of of Congress in conformity to the judiciary sections of the Constitution. . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupuously [sic] confine their own jurisdiction to the precise limits which [a federal] statute has defined.

Id. at 272-73 (quoting Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971), which quotes Healy v. Ratta, 292 U.S. 263, 270 (1934). In its condemnation of the strict "locality" test -- whether a tort occurred on navigable waters or not -- Executive Jet held that for a tort to be cognizable in admiralty it must not only occur in navigable waters, but it must also "bear a significant relationship to traditional maritime activity." Executive Jet at 271. This implies a purposive test rooted in federalism. The Other Half of Executive Jet: The New Rationality in Admiralty Jurisdiction, 57 Tex. L. Rev. 977, 982 (1979). Determining whether a tort is "maritime" involves deciding whether the needs of the maritime industry require the national uniformity of federal jurisdiction. See generally, id. Of course, the "needs of the maritime industry" is another term requiring definition.

The issue in this case then becomes whether personal injuries to workers aboard ships in navigable waters, allegedly caused by exposure to asbestos are torts of a maritime nature requiring uniform treatment or whether state law is better able to resolve the matter.

The law concerning traditional maritime activity includes navigational rules to determine fault and liability. Also, "through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage." Executive Jet at 270. These concerns require uniform treatment. None of these concerns are involved in the case at bar. The concerns in this case involve the

traditional tort and product liability law of Washington state.

A court must not ignore that "expansions of federal admiralty jurisdiction are accompanied by application of substantive -- and preempting -- federal admiralty law." Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4783 (U.S. June 23, 1982) [emphasis in original]. It is difficult to see a federal interest in uniformity in this case. Although the federal interest may not be coterminous with commercial activity, Id. at 4780, the lack of relationship to the business of shipping in the case at bar is fatal to establishing a need for uniformity for there is no other basis for this need. The parties in foremost were engaged in noncommercial activity, but the Court viewed the navigational rules involved as requiring uniform application. In contrast, outfitting the vessels with asbestos insulation as

a part of the total preparation for their being used in shipping at all is too attenuated involvement with the vessels' ultimate navigation upon the sea to erode state law jurisdiction over the personal injury suit in this case. There is no "aptness" for providing a special maritime industry court in the case at bar.

NOW, THEREFORE, because of the federalism concern and because of the insignificant relationship to traditional maritime activity, the Court's June 10, 1982 Order Denying Plaintiff's Motion to Amend Complaint is AFFIRMED upon reconsideration.

DATED this 20th day of September, 1982.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

NO. 82-1836

IN THE SUPREME COURT
OF THE UNITED STATES

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OCTOBER TERM, 1982

KEENE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF PETITIONER KEENE CORPORATION TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI

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Counsel for Petitioner

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MOTION OF PETITIONER KEENE CORPORATION TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI

Petitioner Keene Corporation ("Keene") respectfully requests that the Court defer consideration for the time being of its Petition for Writ of Certiorari ("Keene's Petition"), which is being filed simultaneously with this Motion. The reasons for this request are as follows:

1. As is set forth more fully in Keene's Petition, one of the bases for Keene's Petition to this Court is that there is an irreconcilable conflict among the First, Second, Fourth and Ninth Circuits as to whether admiralty jurisdiction applies to claims of injury caused by exposure to asbestos-containing products in shipyards and on vessels in navigable waters, and third-party actions arising out of those claims. One of those cases, Austin v. Unarco Industries, Inc., No. 82-1168 (1st Cir. Mar. 30, 1983), was decided by the First Circuit on March 30, 1983, approximately seven weeks after the Second Circuit's decision in the present action.

2. Keene believes that the plaintiffs in the Austin case may petition this Court for a writ of certiorari on the issue of, inter alia, the applicability of admiralty jurisdiction to claims of injury due to alleged exposure to asbestos while working in shipyards and on vessels in navigable waters. If such a petition is filed, it will present to this Court issues identical to those presented in Keene's Petition.

3. In these circumstances, it would appear that both petitions should be considered by the Court at the same time. Such consideration will not only conserve the time of the court, but will assure that the Court has the benefit of the views of several affected parties in determining whether to grant certiorari in this matter.

4. Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20, the time for plaintiffs in the Austin case to file their certiorari petition will expire on or about June 28, 1983. Keene therefore requests that the Court

defer consideration of Keene's Petition until that time, and in the event that plaintiffs in Austin file a petition, that both petitions be considered together and at the same time.

5. Keene believes that neither the respondent United States of America nor any other party will be prejudiced by the short delay that is being requested.

CONCLUSION

For the foregoing reasons, the Court should defer consideration of Keene's petition until June 28, 1983, or until such time as plaintiffs' petition in Austin has actually been filed, and should consider both petitions at the same time.

Respectfully submitted,

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Counsel for Petitioner

*Counsel of Record

CERTIFICATE OF SERVICE

I, Eugene R. Anderson, counsel for petitioner Keene Corporation, am a member of the Bar of the Supreme Court of the United States. Pursuant to Rule 28.5(b) of this Court, I hereby certify that on this 11th day of May, 1983, service of the foregoing Motion to Defer Consideration of Petition for Certiorari upon respondent United States of America was made by mailing one copy, with first class postage prepaid, to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Jane Booth, Esq.
United States Attorney's Office
1 St. Andrews Plaza
New York, New York 10007.

I further certify that all parties required to be served have been served.

Dated: May 11, 1983

Eugene R. Anderson
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MOTION OF PETITIONER KEENE CORPORATION TO CONSOLIDATE CONSIDERATION OF PETITIONS FOR CERTIORARI

Petitioner Keene Corporation ("Keene") respectfully requests that the Court consolidate consideration of Keene's Petition for Writ of Certiorari ("Keene's Petition") with the Petition for Writ of Certiorari filed in this Court in Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983), petition for certiorari filed, 52 U.S.L.W. 3005 (June 28, 1983) (No. 82-2164) ("Austin"). The reasons for this request are as follows:

1. Keene's Petition was filed in this Court on May 11, 1983. The respondent United States of America (the "Government") has not yet filed any response to Keene's Petition. The Government's request for an extension until July 13, 1983 to respond to Keene's Petition was granted by the Court on June 6, 1983. The Court recently has granted the Government a second extension of time to respond until August 20, 1983.

2. As is set forth more fully in Keene's Petition, one of the bases for Keene's Petition to this Court is that there is an irreconcilable conflict among the First, Second, Fourth and Ninth Circuits as to whether admiralty jurisdiction applies to claims of injury caused by exposure to asbestos-containing products in shipyards and on vessels in navigable waters, and to third-party actions arising out of those claims. One of the cases creating this conflict was the Austin decision, decided by the First Circuit on March 20, 1983, approximately seven weeks after the Second Circuit's decision in the present action.

3. The plaintiffs in the Austin case have petitioned this Court for a writ of certiorari (the "Austin Petition") on the issue of, inter alia, the applicability of admiralty jurisdiction to claims or injury due to alleged exposure to asbestos while working on vessels in navigable waters. The Austin Petition presents to this Court issues identical to those presented in Keene's Petition.

4. In these circumstances, Keene respectfully requests that consideration of these petitions be consolidated and that both petitions be considered by the Court at the same time. Consolidation of the consideration of these

petitions will not only conserve the time of the Court, but will assure that the Court has the benefit of the views of several affected parties in determining whether to grant certiorari in these cases.

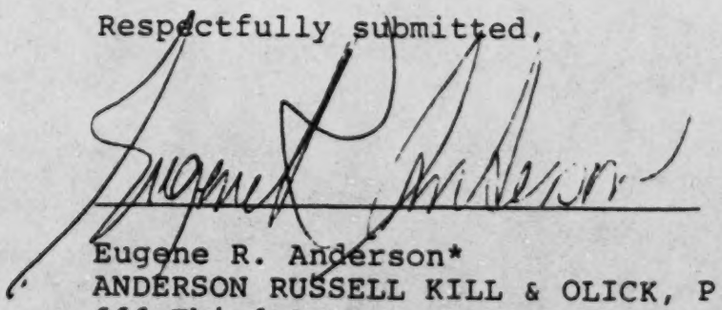
5. Keene believes that neither the respondent United States of America, the parties to the Austin Petition, nor any other party will be prejudiced if Keene's motion is granted.

6. When Keene filed its Petition on May 11, 1983, Keene simultaneously filed a motion to defer consideration of Keene's Petition until the Austin Petition was filed. Keene believes that no action on that motion was ever taken by this Court, and the motion is now mooted by the filing of the Austin Petition.

CONCLUSION

For the foregoing reasons, the Court should consolidate the consideration of Keene's Petition and the Austin Petition and consider both petitions at the same time.

Respectfully submitted,



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OCTOBER TERM, 1982

KEENE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

District of Columbia)
) ss.:
Washington, D.C.)

LORELIE S. MASTERS, being duly sworn, deposes and says that:

1. I am a member of the Bar of the District of Columbia and one of the attorneys for Petitioner Keene Corporation. I am not a member of the Bar of this Court.

2. I have served, this 18th day of July, 1983, the accompanying Motion of Petitioner Keene Corporation to Consolidate Consideration of Petitions for Certiorari by causing three (3) copies thereof to be mailed, properly addressed and with postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530

Lorelie S. Masters
Lorelie S. Masters

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 18th day of July, 1983.

Mary D. Shaw
Notary Public

No. 82-1836

FILED
JUL 19 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a defendant in more than 17,000 damages actions for asbestos exposure, may maintain an omnibus indemnity suit against the United States in admiralty when some of the 17,000 suits allege that injury occurred in land-based facilities and when neither the government's alleged misconduct nor the product triggering the suits bears a significant relationship to traditional maritime activities.

2. Whether petitioner may maintain an omnibus indemnity suit against the United States under the Federal Tort Claims Act when the administrative claim it filed pursuant to 28 U.S.C. 2675(a) does not demand a sum certain or specify the basis for the United States' liability in each of the 17,000 suits against it.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 700 F.2d 836. The opinions of the district court (Pet. App. A40-A79, A80-A87) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983. The petition for a writ of certiorari was filed on May 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at Pet. App. A88-A94.

STATEMENT

1. Petitioner is a defendant in more than 17,000 suits alleging personal injury or wrongful death caused by exposure to insulation products containing asbestos (Pet. 6).[1] Petitioner has settled some of the suits, and judgment has been entered in others. However, the vast majority are still pending in various courts throughout the country (Pet. App. A3 n.1). Petitioner filed the present suit in 1980, seeking to recover from the United States all damages and other costs it may incur as a result of the asbestos lawsuits, citing doctrines of indemnification, contribution, and apportionment (*id.* at A8). Petitioner invoked the Federal Tort Claims Act ("FTCA") (28 U.S.C. (& Supp. V) 1346(b) and 2671 *et seq.*), or, alternatively, the general maritime and admiralty jurisdiction of the United States (28 U.S.C. 1333), the Suits in Admiralty Act (42 U.S.C. 741 *et seq.*), the Extension of Admiralty Jurisdiction Act (46 U.S.C. 740), and the Public Vessels Act (46 U.S.C. 781 *et seq.*) (Pet. App. A4-A5).

Petitioner's amended complaint asserts that "most" of the claimants in the underlying suits were "either employees of [the United States] working in U.S. naval shipyards or employees working in private shipyards under contract to the U.S. Navy, an agency of the United States" (Pet. App. A7). According to the amended complaint, the claimants "typically" have alleged that they worked with or around thermal insulation products containing asbestos and that in the course of their work they were exposed to, and inhaled, air-borne asbestos fibers, resulting in asbestosis or other injuries (*ibid.*). The complaint states that some claimants worked in shipyards (either on shipboard or on land), while others worked in various industrial and commercial plants (*ibid.*).

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[1] Petitioner's former subsidiary was a manufacturer of thermal insulation products containing asbestos (Pet. 6 n.2).

Petitioner's amended complaint includes 23 counts purporting to sound in negligence, breach of warranty, strict liability, and unjust enrichment (Pet. App. A8). Petitioner claims that the government played the roles of a seller of asbestos fiber, a purchaser of asbestos insulation, a designer or specifier of insulation products, an employer of the claimants or their employers, an inspector of the claimants' workplace, and a promulgator and enforcer of health regulations (*id.* at A6). However, in its amended complaint petitioner makes no attempt to categorize the government's role, or the basis for government liability, in the various suits against petitioner (*id.* at A5-A6).

In 1979, before filing this suit, petitioner filed an administrative claim with several government agencies pursuant to the FTCA (Pet. App. A14-A17). See 28 U.S.C. 2675(a). In that claim petitioner generally charged the government with negligence and breach of warranty, as well as "any other theory" that would support a claim for damages, but failed to particularize the basis for government liability in each of the approximately 1,000 suits pending at that time (Pet. App. A15-A16). Petitioner claimed that the government was indebted to it for damages "in the sum of $1,088,135 and in an additional amount yet to be ascertained" (*id.* at A17). The administrative claim included a list of lead plaintiffs and docket numbers for the 1,000 pending lawsuits (*id.* at A14). The Department of Justice responded to the claim on behalf of the government agencies that had received it and requested more detailed information pursuant to 28 C.F.R. 14.4 (Pet. App. A58-A59). Petitioner did not provide the requested information, but instead filed this lawsuit (*id.* at A59). The government sought dismissal of the suit for lack of subject matter jurisdiction under the FTCA and under the various admiralty statutes cited by petitioner.

2. The United States District Court for the Southern District of New York granted the government's motion to dismiss (Pet. App. A40-A79). It ruled: (1) that petitioner's suit was not a third-party action and therefore was not exempt from the administrative claim requirement under 28 U.S.C. 2675(a) (Pet. App. A45-A51); (2) that petitioner's administrative claim did not provide a sufficient basis for FTCA jurisdiction, because it did not demand a specific sum or provide enough information to permit an assessment of government liability in each underlying suit (*id.* at A51-A61); (3) that under *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972), petitioner's suit did not lie in admiralty, because for some of the claims the underlying conduct did not occur on navigable waters and because the remaining claims lacked a significant nexus with traditional maritime activity (Pet. App. A61-A71); and (4) that under the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), petitioner could not seek indemnity from the United States based on suits by federal employees (Pet. App. A71-A77).[2]

The district court concluded that petitioner's suit should be dismissed because it "has attempted to do too much at one time, with too little jurisdiction" (Pet. App. A78-A79). On petitioner's motion for reconsideration, the district court declined (*id.* at A80-A87) to follow two then-recent decisions in which the Fourth Circuit had indicated that admiralty jurisdiction may lie in certain asbestos suits, *White* v. *Johns-Manville Corp.,* 662 F.2d 234 (1981), cert. denied, 454 U.S. 1163 (1982), and *Glover* v. *Johns-Manville Corp.,* 662 F.2d 225 (1981).

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[2]This Court recently reached a different result on the Federal Employees' Compensation Act issue. See *Lockheed Aircraft Corp.* v. *United States,* No. 81-1181 (Feb. 23, 1983). That issue is not raised by the petition in this case.

3. The court of appeals affirmed (Pet. App. A1-A29), primarily for the reasons stated in the district court's opinion (*id.* at A12). The court of appeals noted initially that the administrative claim requirement of the FTCA is jurisdictional and cannot be waived (*id.* at A17). "Since [petitioner] has filed no Notice of Claim regarding the vast majority of the suits against it, it is clear that no jurisdiction exists under the FTCA as to these claims" (*id.* at A18) (footnote omitted).[3] The court concluded that the claim that had been filed as to some of the suits did not satisfy the purpose of the administrative claim requirement, which is to allow the government to investigate, evaluate and consider settlement of a claim (*id.* at A21). The court of appeals held that "a claim which includes 'an additional amount yet to be determined,' which may dwarf the sum stated, is a request for damages so indefinite as to fail to satisfy the statutory purpose" (*id.* at A21), and that the generality of petitioner's administrative claim (which the court characterized as a "laundry list of potential variables") "makes it impossible * * * to evaluate * * * the exposure of the government * * *" (*id.* at A23-A24). Finally, the court of appeals agreed with the district court that petitioner's suit was an "original" action, and therefore not in the nature of a third party complaint exempt from the administrative claim requirement (*id.* at A25-A26). See 28 U.S.C. 2675(a).

In considering petitioner's alternate claim of admiralty jurisdiction, the court of appeals applied the two-pronged

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[3]At the district court level, petitioner's action involved approximately 6,000 underlying suits (Pet. App. A41). By the time the court of appeals considered the case, more than 14,000 underlying suits had been filed against petitioner (*id.* at A3). The number now has grown to more than 17,000 suits (Pet. 6). Petitioner's administrative claim, filed in 1979, covered only about 1,000 of the underlying suits (Pet. App. A3 n.1). After beginning this litigation, petitioner filed another administrative claim covering approximately 3,800 of the underlying suits (*id.* at A14 n.6).

test established by this Court in *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra* — whether the wrong took place on navigable waters ("situs") and whether it bears a significant relationship to traditional maritime activity ("status") (Pet. App. A28-A29). The court of appeals concluded that petitioner's suit does not satisfy the "situs" test, because some of the workers who had sued petitioner "were exposed to asbestos in power plants, refineries, and other land-based commercial facilities, and even if the other workers were exposed to asbestos in a maritime situs * * *, it is impossible to determine which of the underlying actions would be properly heard in admiralty, and which not, without a case by case evaluation" (*id.* at A30-A31).

The court of appeals also held that petitioner's suit did not satisfy the "status" test for admiralty jurisdiction. The court stated (Pet. App. A32-A33):

> First, [petitioner] does not allege that its insulation was designed specifically for maritime use. * * * Second, many of the roles attributed to the government and allegedly giving rise to [petitioner's] cause of action —the government's sale of asbestos to [petitioner], its specification of asbestos as a component of insulation it purchased from [petitioner], its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations — do not bear a significant relationship to traditional maritime activities such as "navigation and commerce."

In reaching this conclusion the court of appeals expressly declined (*id.* at A35-A36) to follow the reasoning of the Fourth Circuit in *White* v. *Johns-Manville Corp., supra,* and *Glover* v. *Johns-Manville Corp., supra,* and the reasoning of the Fifth Circuit in *Sperry Rand Corp.* v. *Radio Corp. of America,* 618 F.2d 319 (1980).

ARGUMENT

The court of appeals' comprehensive decision is correct and does not warrant review by this Court.

1. Petitioner contends (Pet. 17-25) that review is warranted because there is a conflict among the circuits that have considered the application of admiralty jurisdiction to claims of injury caused by exposure to products containing asbestos in shipyards and on navigable waters. But petitioner cites only one court of appeals decision, *White* v. *Johns-Manville Corp., supra,* that permits an admiralty suit for exposure to a product containing asbestos.[4] In *White,* the Fourth Circuit relied on this Court's *Executive Jet* test for admiralty jurisdiction, under which a maritime situs and a significant relationship to traditional maritime activity are required (409 U.S. at 268). See also *Foremost Insurance Co.* v. *Richardson,* No. 80-2134 (June 23, 1982). The court in *White* stressed that the evidence at trial in that case clearly established that the materials used by the five appellant shipyard workers during repair and construction of ships "were designed, advertised and marketed as maritime asbestos products." 662 F.2d at 240.

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[4]The other two cases petitioner cites (Pet. 22-23) in support of admiralty jurisdiction for asbestos suits, *Sperry Rand Corp.* v. *Radio Corp. of America, supra,* and *Glover* v. *Johns-Manville Corp., supra,* do not conflict with this case. *Sperry Rand* did not involve asbestos at all; instead, it involved a product liability suit against the manufacturer of a component of a marine gyro-pilot steering system that allegedly caused a maritime collision. *Glover* did involve asbestos, but did not resolve the admiralty jurisdiction issue. See 662 F.2d at 229 n.4.

Petitioner also cites *White* v. *Johns-Manville Corp.,* 662 F.2d 243 (4th Cir. 1981), referred to as "*White II.*" However, the decision in that case, which involved third-party indemnity claims, merely applied the finding of admiralty jurisdiction in the companion case of *White* v. *Johns-Manville Corp.,* 662 F.2d 234 (4th Cir. 1981), discussed in the text.

The court of appeals in the decision below (Pet. App. A35) and two other courts of appeals (see *Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 9 (1st Cir. 1983), petition for cert. pending, No. 82-2164 (filed June 28, 1983), and *Owens-Illinois, Inc.* v. *United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983)) have disagreed with *White* on the question whether shipyard workers' asbestos injuries satisfy the *Executive Jet* requirement of a significant relationship to traditional maritime activity. But unlike *White* none of these cases appears to have involved clear evidence that asbestos materials were designed, advertised and marketed as maritime products. Indeed, the court of appeals here found an absence of significant relationship to traditional maritime activity because petitioner "does not allege that its insulation was designed specifically for maritime use" (Pet. App. A32). Moreover, petitioner's claims, unlike those in *White* and the other asbestos cases, involve allegations that the United States played several distinct roles, including some that are decidedly non-maritime — for example, its role as inspector or safety regulator. See Pet. App. A32-A33. Because of the important factual distinctions between this case and *White*, they do not establish a true conflict on the "significant relationship" issue.[5]

In any event, the court of appeals correctly decided (Pet. App. A30-A31) that petitioner's suit did not even satisfy the threshold maritime situs test under *Executive Jet*. Petitioner concedes in its complaint that some of the underlying asbestos suits arise from injuries suffered in power plants, refineries, and other land-based commercial facilities (Pet.

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[5]Indeed, the decision below and the cases cited by petitioner make clear that application of the test for admiralty jurisdiction in asbestos cases depends largely on case by case evaluation of jurisdictional facts. Moreover, the court of appeals cases that petitioner cites as in conflict with the decision below do not involve claims against the government for contribution or indemnity.

App. A30). It has made no effort to separate suits with a maritime locality from land-based suits.[6] Because admiralty jurisdiction lies only where the "injury * * * occur[s] on navigable waters" (*Austin* v. *Unarco Industries, Inc., supra,* 705 F.2d at 9), petitioner's failure to specify the maritime locality of the thousands of suits pending against it precludes admiralty jurisdiction. Thus, even if there were a true conflict among the circuits on the "significant relationship" issue, this case would not be an appropriate vehicle for resolution of the conflict.

The fundamental flaw in petitioner's suit is its attempt to consolidate thousands of very different lawsuits into one without attempting to classify or otherwise describe the individual suits. A court cannot determine whether or not admiralty jurisdiction exists without a case-by-case evaluation of parties, claims, and legal theories. Petitioner has declined to provide sufficient information to permit such a determination. Thus, the courts below correctly concluded that petitioner's claims based on admiralty jurisdiction must be dismissed.

2. Petitioner's alternative invocation of FTCA jurisdiction also suffers from its attempt to consolidate too many diverse suits.[7] The courts below correctly concluded that petitioner's omnibus action seeking indemnity in 17,000 underlying suits cannot be maintained because petitioner has failed to satisfy the administrative claim prerequisite to FTCA jurisdiction. See 28 U.S.C. 2675(a).

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[6]The concurring opinion in *White* v. *Johns-Manville Corp., supra,* 662 F.2d at 241-242, noted that the appellant shipyard workers in that case had alleged that between 90 and 97% of their exposure to asbestos occurred on navigable waters and that this allegation had not been contested. Petitioner has not made any similar specific allegations.

[7]FTCA jurisdiction and admiralty jurisdiction are mutually exclusive. See 28 U.S.C. 2680(d); Pet. App. A28 n.11.

Section 2675(a) prohibits FTCA suits "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency * * *." Congress required preliminary administrative presentation of a claim in order to "permit a government agency to evaluate and settle the claim at an early stage, both for the possibility of financial economy and for the sake of relieving the judicial burden of FTCA suits * * *." *Swift* v. *United States*, 614 F.2d 812, 814 (1st Cir. 1980), quoting *Kornbluth* v. *Savannah*, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975). In light of this congressional purpose, every court that has considered the administrative claim requirement of Section 2675(a) has concluded that, at a minimum, a claimant must provide notice of accident and injury and a claim for a "sum certain." *Avery* v. *United States*, 680 F.2d 608, 610 (9th Cir. 1982). Accord, *Douglas* v. *United States*, 658 F.2d 445, 447-449 (6th Cir. 1981); *Lunsford* v. *United States*, 570 F.2d 221, 224-227 (8th Cir. 1977).

Despite these established requirements, petitioner filed an administrative claim that (1) failed to provide notice of the particular claim and injury in each of the suits against petitioner, and (2) did not seek a sum certain, but instead sought "$1,088,135 and * * * an additional amount yet to be ascertained" (Pet. App. A17). Indeed, petitioner filed no administrative claim at all for the great majority of the 17,000 suits that by now have been filed against it. See note 3, *supra*. In these circumstances, the court of appeals correctly concluded (Pet. App. A21-A24) that petitioner had given the United States no realistic opportunity to evaluate its exposure or settle petitioner's indemnity suit, as required by 28 U.S.C. 2675(a).

Petitioner suggests (Pet. 25-29) that there is a conflict among the circuits with respect to whether Department of Justice regulations requiring a detailed notice of claim (28

C.F.R. 14.1 *et seq.*) are binding in a jurisdictional sense. Compare, *e.g., Lunsford* v. *United States, supra,* 570 F.2d at 223-227 (compliance with regulations is jurisdictional), with *Avery* v. *United States, supra,* 680 F.2d at 610-611 (compliance is not jurisdictional). The court of appeals found it unnecessary to decide this issue (Pet. App. A21 n.9), and it is therefore not properly raised in this Court. Moreover, even the circuits that have concluded that the Justice Department regulations are not jurisdictional nevertheless require under Section 2675(a) a "skeletal claim form, containing * * * the bare elements of notice of accident and injury and a sum certain representing damages * * *." *Avery* v. *United States, supra,* 680 F.2d at 610. Petitioner has not even come close to satisfying that modest and undisputed statutory requirement.

Petitioner contends (Pet. 32) that its omnibus administrative claim was sufficient because "the Government * * * is fully aware of the facts and allegations underlying [petitioner's] claim." Even if this contention were correct, it would not compensate for the inadequacy of petitioner's administrative claim, because, as noted above, a proper claim is a statutory prerequisite to suit. In any event, petitioner's contention is not correct. Although the government is aware in a general sense of asbestos litigation and issues, it has no way of evaluating its possible liability for indemnity in each of the 17,000 different suits against petitioner.

Petitioner has provided no basis on which the United States (or a court) conceivably could consider possible liability and damages. Although petitioner's desire to simplify its litigation burden is understandable, its effort to do so by pursuing a single omnibus indemnity suit to cover 17,000 underlying actions would, as the court of appeals concluded (Pet. App. A39), "do violence to established processes of the judicial system and well established principles relating to the FTCA and admiralty jurisdiction."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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